

San Francisco Law Library

436 CITY HALL

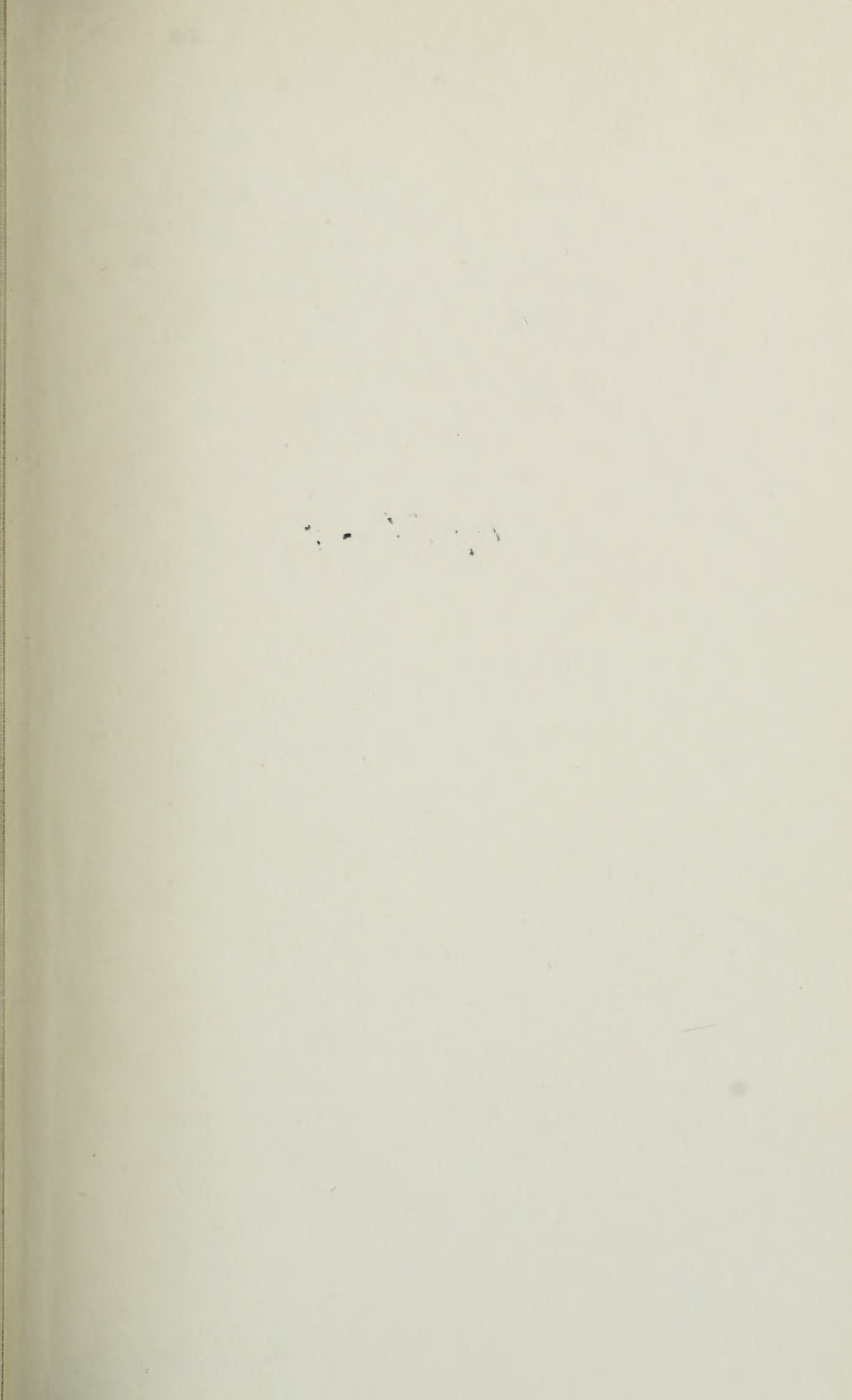
No. 148024

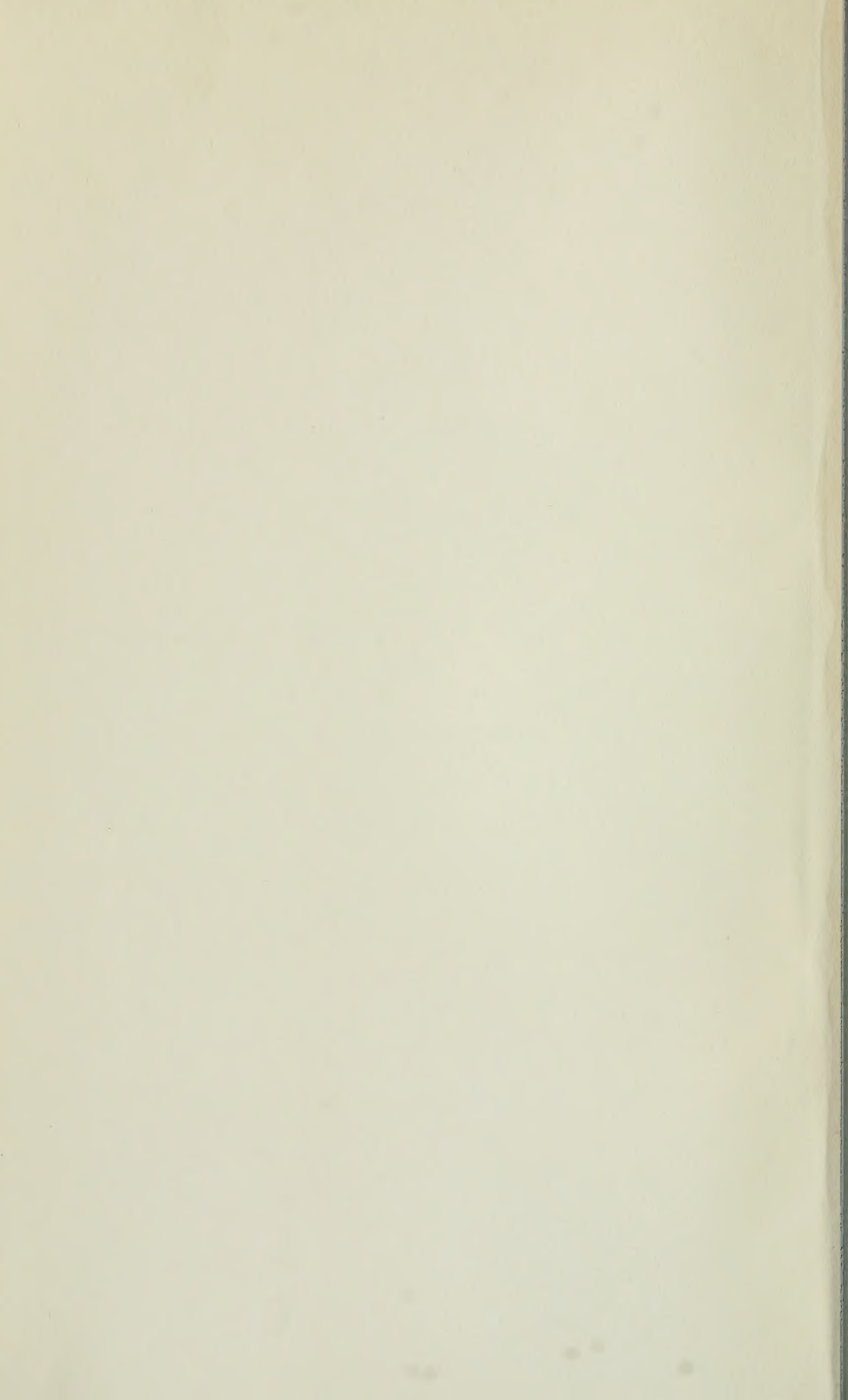
EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.





No. 12554

2644

United States
Court of Appeals
For the Ninth Circuit.

THOMAS G. CHAMBERLAIN and CENTRAL
HANOVER BANK & TRUST COMPANY as
Successor Trustees Under the Last Will and
Testament of Samuel L. Clemens, deceased,
MARK TWAIN COMPANY and CLARA
CLEMENS SAMOSSOUD,

Appellants,

vs.

COLUMBIA PICTURES CORPORATION,

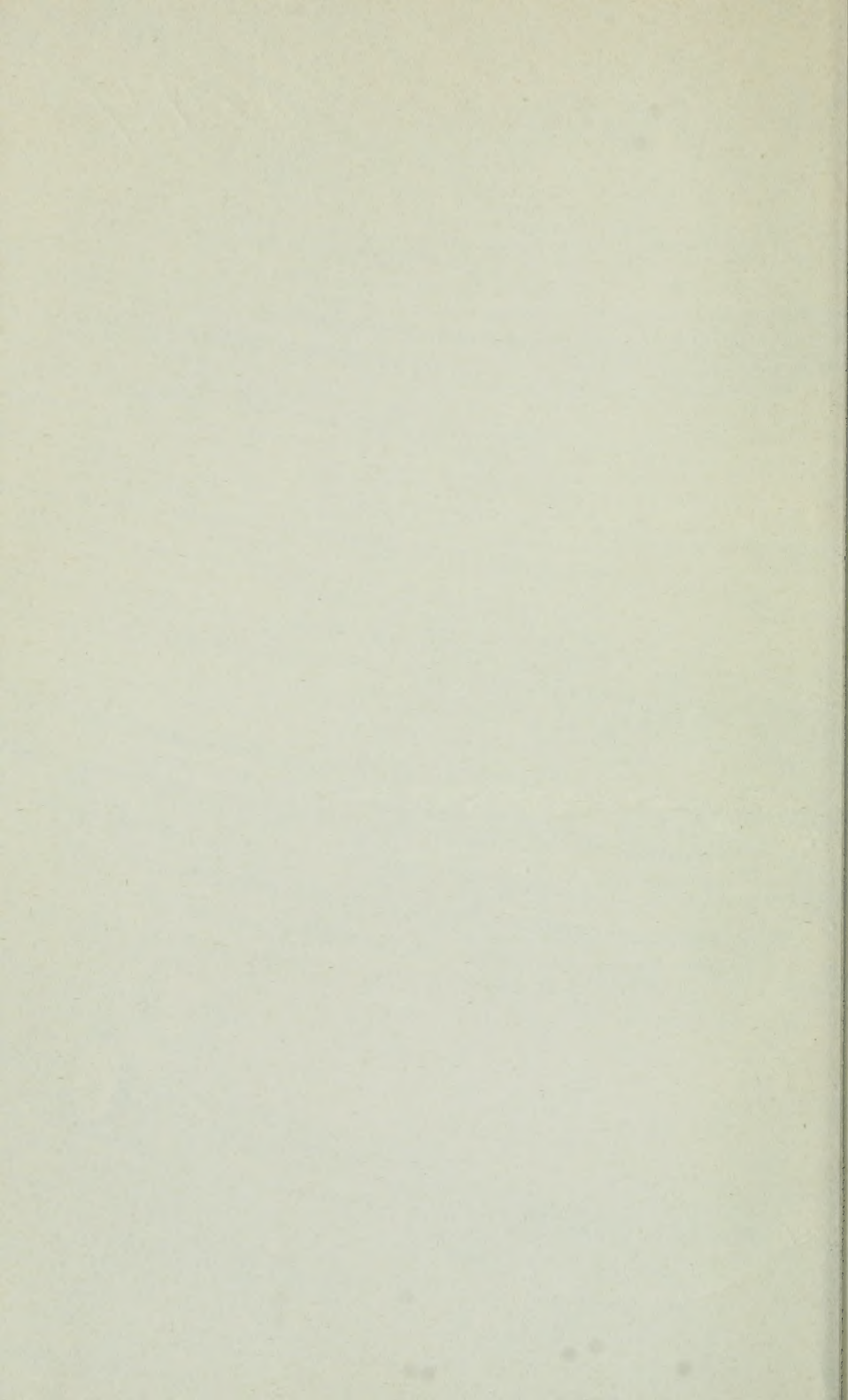
Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

JUL 24 1950



No. 12554

United States
Court of Appeals
For the Ninth Circuit.

THOMAS G. CHAMBERLAIN and CENTRAL
HANOVER BANK & TRUST COMPANY as
Successor Trustees Under the Last Will and
Testament of Samuel L. Clemens, deceased,
MARK TWAIN COMPANY and CLARA
CLEMENS SAMOSSOUD,

Appellants,

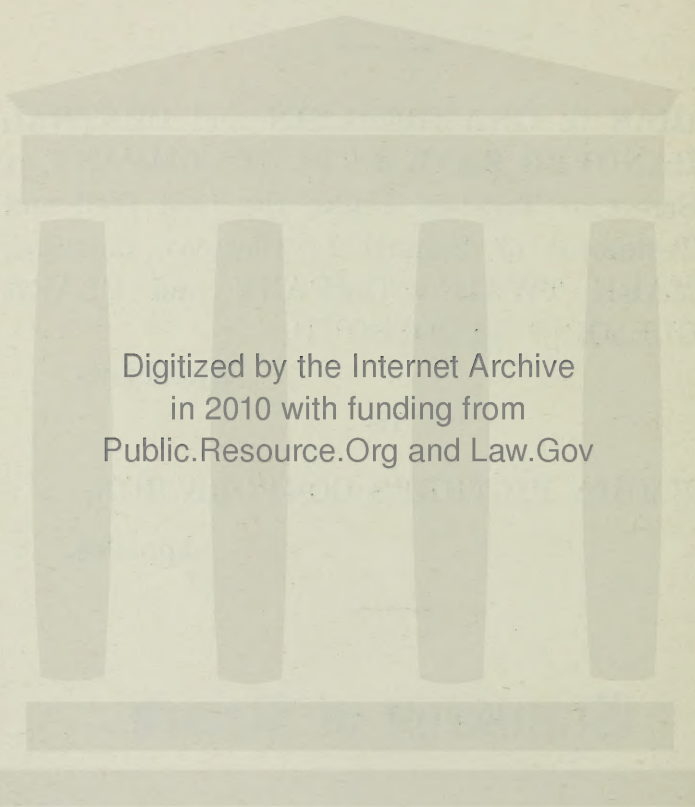
vs.

COLUMBIA PICTURES CORPORATION,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Complaint for Injunction, Unfair Competition and for An Accounting and Damages	2
Certificate of Clerk.....	58
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	24
Notice by Clerk of Entry of Judgment.....	23
Notice of Motions to Dismiss and to Strike From Amended Complaint and Memorandum of Points and Authorities.....	17
Order of Dismissal.....	21
Points on Which Appellants Intend to Rely and Designation of Record.....	60
Reporter's Transcript of Proceedings.....	25

It is a very common mistake to suppose that the only way to get the most out of a book is to read it straight through from beginning to end. This is not the case. The best way to read a book is to read it in a way that suits your own mind and your own needs. You should read a book in a way that is comfortable and convenient for you. You should read a book in a way that is interesting and enjoyable for you. You should read a book in a way that is useful and profitable for you.

There are many different ways to read a book. Some people read a book straight through from beginning to end. Some people read a book in a way that is comfortable and convenient for them. Some people read a book in a way that is interesting and enjoyable for them. Some people read a book in a way that is useful and profitable for them. The best way to read a book is the way that suits you best. You should read a book in a way that is comfortable and convenient for you. You should read a book in a way that is interesting and enjoyable for you. You should read a book in a way that is useful and profitable for you.

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

HARRY E. SOKOLOV,
6253 Hollywood Blvd.,
Los Angeles 28, Calif.

For Appellee:

MITCHELL, SILBERBERG & KNUPP,
603 Roosevelt Bldg.,
Los Angeles 14, Calif.

In the District Court of the United States, Southern
District of California, Central Division

No. 10535-C

THOMAS G. CHAMBERLAIN and CENTRAL
HANOVER BANK & TRUST COMPANY as
Successor Trustees Under the Last Will and Tes-
tament of Samuel L. Clemens, Deceased, MARK
TWAIN COMPANY, and CLARA CLEMENS
SAMOSSOUD,

Plaintiffs,

vs.

COLUMBIA PICTURES CORPORATION, a Cor-
poration, DOE ONE, DOE TWO and DOE
ONE CORPORATION,

Defendants.

AMENDED COMPLAINT FOR INJUNCTION,
UNFAIR COMPETITION AND FOR AN AC-
COUNTING AND DAMAGES

Come now the plaintiffs, and for cause of action
against the defendants, allege as follows, to wit.

I.

That the plaintiffs, Thomas G. Chamberlain and
Central Hanover Bank & Trust Company, are suc-
cessor trustees under the Last Will and Testament
of Samuel L. Clemens, deceased (Mark Twain).
That plaintiff Mark Twain Company is a corpora-
tion organized by Samuel L. Clemens during his
lifetime, for the purpose of engaging in the busi-

ness of exploiting and publishing the literary property written by him, and for the further purpose of development of the name "Mark Twain" and the literary works of Samuel L. Clemens (Mark Twain).

II.

That under the Last Will and Testament of Samuel L. Clemens, deceased (Mark Twain), any and all rights in and to literary material written by him during his lifetime, whether published or unpublished, and which he possessed at the time of his death, as well as all of the stock of the Mark Twain Corporation as aforementioned, were placed in a trust.

III.

That the trustees named and designated in the Last Will and Testament as the trustees for the trust created by said Will, succeeded to any and all rights which the said Samuel L. Clemens, deceased, had in all literary properties written by him, at the time of his death.

IV.

That the plaintiffs Thomas G. Chamberlain and Central Hanover Bank & Trust Company are the successor trustees of the trust aforementioned created under the Last Will and Testament of Samuel L. Clemens, deceased, and are now, and at all times herein mentioned were, the sole owners of all of the stock, and own and control the said Mark Twain Company, and are now, and at all times herein mentioned were, the sole owners of the

literary properties and the rights in and to said literary properties possessed by Samuel L. Clemens (Mark Twain) at the time of his death.

V.

That the plaintiff Clara Clemens Samossoud is the daughter and sole heir of the deceased Samuel L. Clemens (Mark Twain), and is named in the Last Will and Testament of Samuel L. Clemens, deceased, as the sole income beneficiary of the trust created under the Will during the life of the trust, and will, by the terms of the Will, after the expiration of the trust, succeed to all of the rights in and to the literary property of Samuel L. Clemens, aforementioned.

VI.

That the defendant Columbia Pictures Corporation is a corporation producing, distributing and exhibiting motion picture photoplays.

VII.

That plaintiffs are not aware of the true names or capacities, whether individual, corporate, associate, or otherwise, of defendants Doe One, Doe Two and Doe One Corporation, and therefore sue said defendants by such fictitious names, and leave of court will be asked to amend this complaint to show their true names and capacities when same have been ascertained.

VIII.

That Samuel L. Clemens, deceased (Mark Twain).

during his lifetime, and for approximately fifty years prior to his death in 1910, was an author and writer by profession; that he had been in the habit for said time of publishing articles, sketches, books and other literary matter composed by him for publication under the name assumed by him to designate himself as the author and writer of such articles, sketches, books and other literary matter, of "Mark Twain"; that the said designation of "Mark Twain" had been by said decedent Samuel L. Clemens used by him during said time aforementioned as his nom de plume or trademark as an author.

IX.

That said writings under the designation of "Mark Twain" have acquired great popularity and met with ready and continuous sale, and presently are recognized as very important, reputable literary works of quality, style and content, and plaintiffs have for some time in the past, and are presently engaged in the business of exploiting and publishing the aforesaid literary works as the literary works of Mark Twain and are deriving substantial income from the sale and licensing of the said literary works of the deceased Samuel L. Clemens (Mark Twain).

X.

That the name and mark of Mark Twain has been substantially, exclusively and continuously used in connection with the literary works of Samuel L. Clemens by Samuel L. Clemens, deceased, during his lifetime and subsequent to his death in 1910, by

plaintiffs who succeeded to the rights in said literary properties, and said mark and name has become distinctive and indicates in the literary market throughout the world only the literary works and writings of Samuel L. Clemens, deceased.

XI.

That within the past several years the plaintiffs have registered the name "Mark Twain" as a trademark in all states and with the United States Government, and in recent years, the plaintiffs have licensed the use of the name "Mark Twain" for literary products and for commercial purposes in connection with non-literary products.

XII.

That at the time of the death of Samuel L. Clemens (Mark Twain), deceased, in the year 1910, most of his literary properties were fully protected by copyright, and were placed in a trust with his Will along with other property. The income from this was, by the Last Will and Testament of Samuel L. Clemens, deceased, bequeathed to his daughter, the plaintiff herein, Clara Clemens Samossoud.

XIII.

That with respect to a great many of the literary properties of Samuel L. Clemens (Mark Twain), deceased, full copyright protection exists in the United States as well as in many foreign countries.

XIV.

That with respect to the literary properties that are protected by copyright as aforesaid, the plaintiffs are the owners thereof, and have the sole and exclusive right to sell, license or otherwise deal with said literary properties.

XV.

That from time to time since the death of Samuel L. Clemens (Mark Twain), in 1910, plaintiffs have licensed or otherwise disposed of some of the rights in and to the aforesaid literary properties of the deceased, and still continue to so license or otherwise dispose of the rights in and to the aforesaid literary properties, resulting in substantial income to the plaintiffs and the Estate of Samuel L. Clemens (Mark Twain), deceased.

XVI.

That during his lifetime, Samuel L. Clemens (Mark Twain), deceased, composed and wrote a short story entitled, "The Celebrated Jumping Frog of Calaveras County." That said short story became and still is very popular, and has been at all times mentioned herein, and still is, identified by the reading public as one of the more famous of Mark Twain's literary properties, and has been known and recognized by the reading public as an outstanding example of the unusual literary style, wit, humor, talents and ability of Mark Twain and his literary writings.

XVII.

That during the year 1948, defendant, Columbia Pictures Corporation, produced and manufactured a motion picture photoplay entitled, "Best Man Wins." That subsequent to the production and manufacture of said motion picture photoplay during the year 1948, defendant has been and is presently continuing to cause said motion picture photoplay to be distributed, released, and exhibited in thousands of motion picture theatres throughout the United States.

XVIII.

That in connection with the production, distribution, release and exhibition of the said motion picture photoplay, "Best Man Wins," the defendant has advertised, publicized and exploited the aforesaid motion picture photoplay as either "One of Mark Twain's favorite stories," or "Based on the Mark Twain story, 'The Celebrated Jumping Frog of Calaveras County'," and that the defendant in connection with the advertising, publicizing and exploiting the motion picture photoplay aforementioned, entitled "Best Man Wins," has indicated or announced on the negative and on the prints of the film, "Best Man Wins" itself, that the said picture is based upon the Mark Twain story, "The Celebrated Jumping Frog of Calaveras County," and caused to be inserted in various newspapers, magazines, periodicals and motion picture trade papers and magazines, advertising and publicity in various words and phrases indicating that said motion pic-

ture photoplay, "Best Man Wins," is either based on a story written by Mark Twain entitled, "The Celebrated Jumping Frog of Calaveras County," or based on a story written by Mark Twain entitled, "Best Man Wins." For example, "Mark Twain's tale of a gamble in hearts!" which was advertised in the New York Daily Mirror, issue of October 8, 1948, Brooklyn edition, page 32; "Mark Twain's Favorite Story," advertised in the Courier Journal, Louisville, Kentucky, June 11, 1948, page 4, Section 2; "Mark Twain's Lovable Rogue, who would a wandering and a wooing go" (referring to the character in the picture of Smiley rather than the story), contained in advertising matter appearing in the front of the Orient Theatre, Jersey City, New Jersey, on September 16, 1948; "A Story only Mark Twain Could Tell," appearing on advertising matter in the front of the Orient Theatre September 16, 1948.

XIX

That during his lifetime, the said Samuel L. Clemens, deceased (Mark Twain), never wrote or composed any story or literary property entitled, "Best Man Wins."

XX.

That the famous story aforementioned, written by Samuel L. Clemens, entitled "The Celebrated Jumping Frog of Calaveras County," is a short story dealing with a single incident in the life of one Jim Smiley. Nothing in this story appears concerning Smiley's life or character, except that it is

pointed out that he would bet on anything. In the story, Jim Smiley owns a jumping frog called "Dan'l Webster," and he makes a bet with another man who produces another frog, as to which frog can jump the farthest. Jim Smiley loses the bet because the other man fills "Dan'l Webster" with buckshot so that he cannot jump, and the story ends with Jim Smiley chasing the other man after he finds out the trick that has been played upon him.

XXI.

In the motion picture photoplay produced, distributed, released and exhibited by the defendant as aforementioned, entitled "Best Man Wins," there is a flash at the outset that reads: "Based on the Mark Twain story, 'The Celebrated Jumping Frog of Calaveras County.' "

XXII.

The character Jim Smiley, who was the central character in Mark Twain's story, is also the central character of the motion picture, but the story itself, is completely different from the Mark Twain story, and actually, the incident which is the center of the Mark Twain story does not appear in the motion picture at all, although the jumping frog, "Dan'l Webster," appears throughout the movie. The frog does get filled with buckshot at the end of the movie, but the incident is entirely different from that set forth in the story by Mark Twain and Jim Smiley states that the buckshot trick was one he "learned in Calaveras County, California." The

motion picture tells a very common, ordinary, and what is commonly characterized in the motion picture theatrical industry as "corny" love story. Jim Smiley married the lady of the movie, had a son by her, then deserted her and never even wrote her a letter for about twelve years. Then he showed up again and made a hit with the boy, and later remarried the mother of the boy. During the absence of Jim Smiley, the mother had secured a divorce and had planned to marry another man. In the Mark Twain story there was nothing about the life of Jim Smiley, except that he was a natural born gambler, and would bet on anything, but in the motion picture photoplay, Jim Smiley turns out to be not only a gambler, but a wife deserter as well.

XXIII.

That the motion picture photoplay entitled "Best Man Wins" produced and exhibited by the defendant, is an inferior motion picture photoplay, falsely and untruelly representing that Samuel L. Clemens, deceased (Mark Twain), was the author or composer of the story upon which it is based.

XXIV.

That the defendant in producing the motion picture photoplay aforementioned, "Best Man Wins," deformed and mutilated the literary property of the deceased Mark Twain, entitled "The Celebrated Jumping Frog of Calaveras County," and has advertised, publicized, exploited, and announced to the general public at large that such deformed and

mutilated story was in fact the literary composition of Mark Twain, when in truth and in fact, such representations, announcements, publications and advertising were false and untrue, and the defendant well knew them to be false and untrue, and caused such announcements, advertising, publications and exploitation to be made for the sole purpose of deceiving the general public, for defendant's own personal profit and advantage, resulting in damage and injury to the plaintiffs and the property of the plaintiffs.

XXV.

That the defendant in deforming, mutilating and garbling the story of Mark Twain, "The Celebrated Jumping Frog of Calaveras County," in connection with the production and exhibition of the motion picture photoplay aforementioned, "Best Man Wins," and coupling same with a story which substantially is not the creation of Mark Twain, and by ascribing authorship to Mark Twain of the said story as used in the motion picture photoplay, has caused great and irreparable injury and damage to the name and reputation of Mark Twain and to property rights of the plaintiffs in the total sum of \$150,000.00.

For a Further and Second Cause of Action, Plaintiffs Complain and Allege as Follows:

I.

Incorporate herein by reference, paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII,

XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII and XXIV of plaintiffs' first cause of action, and make the same a part hereof by reference as though repeated herein.

II.

That by reason of the acts and conduct of the defendant as aforementioned in connection with the production and exhibition and the advertising and publicizing of said motion picture photoplay as aforementioned, great damage has been suffered and irreparable injury has been sustained by the plaintiffs, in that the false, improper, misleading and reprehensible use by defendant of the work of Mark Twain, "The Celebrated Jumping Frog of Calaveras County," has depreciated the value of and the income from the literary works and property of Mark Twain as aforementioned, which are protected by copyright in the United States and certain foreign countries, all to the damage of the plaintiffs in the sum of \$150,000.00.

For a Further and Third Cause of Action, Plaintiffs Complain and Allege as Follows:

I.

Incorporate herein by reference, paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII and XXIV of plaintiffs' first cause of action, and make the same a part hereof by reference as though repeated herein.

II.

That by reason of the acts and conduct of the defendants aforementioned, in connection with the production, exhibition, advertising and publicizing of said motion picture photoplay as aforementioned, defendants became liable to the plaintiffs pursuant to the provisions of the Lanham Trademark Act of July 5, 1946, Stat. 427, incorporated in 15 U.S.C.A., Sections 1051-1127, and particularly Section 1125, subdivision (a) 15 U.S.C.A., which reads as follows:

“Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.”

III.

That by reason of the false description and false representations made by the defendant as hereinbefore alleged in this third cause of action, plaintiffs have been damaged in the sum of \$150,000.00. Wherefore, plaintiffs pray for relief as follows:

(1) That the defendant be enjoined from exhibiting the motion picture photoplay produced by it entitled, "Best Man Wins," until it removes from the negative and all positive prints thereof any reference to the fact that same is a Mark Twain story, or based upon a Mark Twain story, whether it be a reference to the Mark Twain story of "The Celebrated Jumping Frog of Calaveras County" or any other Mark Twain story.

(2) That the defendant be enjoined from advertising, publicizing, or otherwise exploiting the aforementioned motion picture photoplay produced and exhibited by the defendant, entitled, "Best Man Wins," in any newspapers, magazines, periodicals, motion picture trade papers or otherwise, that said motion picture photoplay is a Mark Twain story, or is based upon the Mark Twain story, "The Celebrated Jumping Frog of Calaveras County," or otherwise, and it be decreed and ordered that the defendant eliminate any and all reference to Mark Twain in connection with the motion picture photoplay, "Best Man Wins," and in connection with any advertising publicity, or exploitation in connection with such exhibition of said motion picture photoplay.

(3) For an accounting of the gross receipts and profits realized by defendant or any of its affiliated or subsidiary companies from the exhibition, release or other disposition of the aforesaid motion picture photoplay, "Best Man Wins."

(4) For damages in the sum of \$150,000.00 as set forth and claimed by virtue of the First Cause of Action.

(5) For damages in the sum of \$150,000.00 as set forth and claimed by virtue of the Second Cause of Action.

(6) For damages in the sum of \$150,000.00 as set forth and claimed by virtue of the Third Cause of Action.

(7) For costs of suit.

(8) For such other relief as to this Court may seem equitable in the premises.

/s/ HARRY E. SOKOLOV,
Attorney for Plaintiffs.

[Endorsed]: Filed December 16, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTIONS TO DISMISS AND TO
STRIKE FROM AMENDED COMPLAINT
AND MEMORANDUM OF POINTS AND
AUTHORITIES

To Plaintiffs, Thomas G. Chamberlain and Central Hanover Bank & Trust Company as Successor Trustees under the Last Will and Testament of Samuel L. Clemens, Deceased, Mark Twain Company, and Clara Clemens Samossoud, and to Harry E. Sokolov, Esquire, Attorney for Plaintiffs:

Please Take Notice that on the 30th day of January, 1950, at the hour of 2:00 o'clock p.m., of said day, in the court room of the Honorable James M. Carter, United States Post Office and Court House Building, Los Angeles, California, the undersigned defendant will move the Court as follows:

I, To dismiss the amended complaint on file herein on the ground that it fails to state a claim upon which relief can be granted and upon the further ground that the above-entitled Court is without jurisdiction over the subject matter.

II. To dismiss the first alleged cause of action of the amended complaint on file herein on the ground that it fails to state a claim upon which relief can be granted and upon the further ground that the above-entitled Court is without jurisdiction over the subject matter.

III. To dismiss the second alleged cause of action of the amended complaint on file herein on the ground that it fails to state a claim upon which relief can be granted and upon the further ground that the above-entitled Court is without jurisdiction over the subject matter.

IV. To dismiss the third alleged cause of action of the amended complaint on file herein on the ground that it fails to state a claim upon which relief can be granted and upon the further ground that the above-entitled Court is without jurisdiction over the subject matter.

V. To strike from the amended complaint each of the following portions thereof, upon the ground that each of said portions is immaterial and impertinent.

A. All of paragraph X (page 4) reading as follows:

“That the name and mark of Mark Twain has been substantially, exclusively and continuously used in connection with the literary works of Samuel L. Clemens by Samuel L. Clemens, deceased, during his lifetime and subsequent to his death in 1910, by plaintiffs who succeeded to the rights in said literary properties, and said mark and name has become distinctive and indicates in the literary market throughout the world only the literary works and writings of Samuel L. Clemens, deceased.”

B. That portion of paragraph XI (page 4, lines 11-13), reading as follows:

“That within the past several years the plaintiffs have registered the name ‘Mark Twain’ as a trademark in all states and with the United States Government, . . .”

C. That portion of paragraph XI (page 4, lines 13-16), reading as follows:

“ . . . and in recent years, the plaintiffs have licensed the use of the name ‘Mark Twain’ for literary products and for commercial purposes in connection with non-literary products.”

D. That portion of paragraph XII (page 4, line 20), reading as follows:

“ . . . were fully protected by copyright, . . . ”

E. All of paragraph XIII (page 4, lines 26-29), reading as follows:

“That with respect to a great many of the literary properties of Samuel L. Clemens (Mark Twain), deceased, full copyright protection exists in the United States as well as in many foreign countries.”

F. All of paragraph XIV (pages 4-5, lines 31-2), reading as follows:

“That with respect to the literary properties that are protected by copyright as aforesaid, the plaintiffs are the owners thereof, and have the sole and exclusive right to sell, license or otherwise deal with said literary properties.”

G. That portion of paragraph XXII (page 7, lines 20-21), reading as follows:

“... but the story itself, is completely different from the Mark Twain story, ...”

H. That portion of paragraph XXII (page 7, lines 25-26), reading as follows:

“... but the incident is entirely different from that set forth in the story by Mark Twain ...”

I. That portion of paragraph XXII (page 7, lines 27-30), reading as follows:

“... The motion picture tells a very common, ordinary, and what is commonly characterized in the motion picture theatrical industry as ‘corny’ love story ...”

J. All of paragraph XXIII (page 8, lines 9-13), reading as follows:

“That the motion picture photoplay entitled, ‘Best Man Wins,’ produced and exhibited by the defendant, is an inferior motion picture photoplay, falsely and untruelly representing that Samuel L. Clemens, deceased (Mark Twain), was the author or composer of the story upon which it is based.”

K. That portion of paragraph XXV (page 9, lines 5-6), reading as follows:

“... in the total sum of \$150,000.00.”

L. That portion of paragraph II of the second cause of action, (page 9, line 26), reading as follows:

“... in the sum of \$150,000.00.”

M. That portion of paragraph III of the third cause of action, (page 10, lines 30-31), reading as follows:

“ . . . in the sum of \$150,000.00.”

Said motions will be based upon the amended complaint on file herein, upon this Notice of Motion and upon the Memorandum of Points and Authorities attached hereto and upon all papers, records and pleadings heretofore had herein.

MITCHELL, SILBERBERG &
KNUPP and
LEONARD A. KAUFMAN.

By /s/ LEONARD A. KAUFMAN.

[Endorsed]: Filed January 5, 1950.

[Title of District Court and Cause.]

ORDER OF DISMISSAL

The above action having come on regularly to be heard on January 30, 1950, upon the motions of defendant Columbia Pictures Corporation, to dismiss said action, and the Court having heard the argument of counsel and being fully advised in the premises, does hereby find that said motions should be granted upon the ground and for the reason that the amended complaint herein fails to state a claim upon which relief can be granted.

Said defendant's motions to dismiss said action

and each alleged cause of action thereof upon the ground of lack of jurisdiction over the subject matter, are denied.

Wherefore, it is ordered, adjudged and decreed, that said action be, and the same hereby is dismissed.

Dated: This 7th day of February, 1950.

/s/ JAMES M. CARTER,
District Judge.

Approved as to Form:

/s/ HARRY E. SOKOLOV,
Attorney for Plaintiffs, Thomas G. Chamberlain and
Central Hanover Bank & Trust Company as
Successor Trustees under the Last Will and
Testament of Samuel L. Clemens, Deceased,
Mark Twain Company, and Clara Clemens
Samossoud.

Dismissal entered Feb. 8, 1950.

[Endorsed]: Filed February 7, 1950.

[Title of Court.]

NOTICE BY CLERK OF ENTRY
OF JUDGMENT

Harry E. Sokolov, Esq.,
528 Equitable Bldg.,
Los Angeles 28, Calif.

Mitchell, Silberberg & Knupp, Esq.,
603 Roosevelt Building,
Los Angeles 14, Calif.

Re: Chamberlain et al, v. Columbia Pictures
et al, No. 10535-C.

You are hereby notified that Order of Dismissal
has been entered this day in the above-entitled case,
in Judgment Book No. 63, page 631.

Dated: Los Angeles, California, February 8,
1950.

EDMUND L. SMITH,
Clerk.

By C. A. SIMMONS,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court and to Defendant Columbia Pictures Corporation and Their Attorneys Mitchell, Silberberg & Knupp:

Notice Is Hereby Given that Thomas G. Chamberlain and Central Hanover Bank & Trust Company as successor Trustees under the Last Will and Testament of Samuel L. Clemens, Deceased, Mark Twain Company and Clara Clemens Samossoud, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the 9th Circuit, from the Order of Dismissal of plaintiffs' Amended Complaint, which was granted upon the ground and for the reason that the Amended Complaint fails to state a claim upon which relief can be granted.

/s/ HARRY E. SOKOLOV,
Attorney for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]. Filed March 6, 1950.

In the United States District Court, Southern
District of California, Central Division

No. 10535-C Civil

THOMAS G. CHAMBERLAIN and CENTRAL
HANOVER BANK & TRUST COMPANY
as Successor Trustees Under the Last Will and
Testament of Samuel L. Clemens, Deceased,
MARK TWAIN COMPANY, and CLARA
CLEMENS SAMOSSOUD,

Plaintiffs,

vs.

COLUMBIA PICTURES CORPORATION, a
Corporation, DOE ONE, DOE TWO and DOE
ONE CORPORATION,

Defendants.

Honorable James M. Carter,
Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiffs:

HARRY E. SOKOLOV, Esq.

For the Defendant Columbia Pictures Corpora-
tion:

MITCHELL, SILBERBERG & KNUPP,

By LEONARD A. KAUFMAN, Esq.

Monday, January 30, 1950

The Clerk: No. 10535-C, Civil, Thomas G. Chamberlain v. Columbia Pictures Corporation. Motions of defendant to dismiss or to strike.

Mr. Sokolov: Ready.

The Court: Counsel, I have read all the briefs. I have read the opening brief and the reply brief and the closing brief.

I think we might save time if we let Mr. Sokolov start, and then give you such time as you want or need, Mr. Kaufman.

Mr. Kaufman: Very well.

The Court: I don't want to preempt your right to argue, but I thought you might be interested in knowing what reactions I have to this case after reading these briefs over and reading your complaint. It might assist you in the argument if I told you something about what I was thinking.

Mr. Sokolov: I would appreciate it, your Honor.

The Court: Otherwise, you may be arguing matters on which I am in agreement and those that would not require any argument.

I don't want to pass on this until I hear some argument, but as I read the briefs over—and obviously I didn't have a chance to look at all these cases you have cited, but you have done a very excellent job in presenting your respective [2*] positions by the briefs—as I read them over and got through reading defendants' opening brief and then read yours, the thought occurred to me that this

* Page numbering appearing at top of page of original Reporter's Transcript.

whole thing hinged on what was relatively a very simple matter. Apparently Mark Twain didn't copyright "The Jumping Frog of Calaveras County," whatever it was. By not copyrighting it and permitting it to be published it became part of the public domain. It belonged to everybody, it belonged to me and it belonged to you, and the thought occurred to me how can the plaintiff assert an exclusive right to that, assuming for argument some of your contentions as to trade-mark. Then when I read defendant's reply brief I see that he took the same position and developed it quite extensively.

I want to avoid attaching undue significance to that point for the reason that I am cognizant of how human nature works. Having gotten an idea and then the defendant coming along and taking the same position, I don't want to attach undue significance to that particular point. But it seems to me that that runs through the entire case. In other words, if your contention is correct—I am referring specifically now to what you argue on about page 8 of your opening brief, plaintiff's brief, referring to lines 17 to 28, your paragraph XII—if your point is good, then any time anybody published "The Jumping Frog of Calaveras County," with the name Mark Twain on it, you could restrain them. If I got up [3] before a literary society and said, "An ad was put out on such-and-such a date that Carter will read 'The Jumping Frog of Calaveras County,' by Mark Twain," bingo, you could come and get an injunction because I used the name "Mark Twain."

You obviously can't do that. That story and the name with the story belongs to the public. How, then, can you assert any exclusive right?

I go along with your brief on your cases distinguishing between situations where there is palming off and competition or situations on confusion. It seems to me that you logically make a good point that the rule is broader and that in certain cases restraint will be granted, injunctions will be granted, where there is confusion, even though there isn't actual competition of one product with another. But you still fall back upon the point that in those cases the plaintiff had an exclusive right.

Let's take another situation. Take your WOR case. There you had more of an exclusive right. WOR started out and took the symbols WOR, and there was in the public domain no right to use WOR. Until WOR came along and pioneered it and spent money on building up that station it wasn't known, so when the printer went into business with WOR the court granted the station an injunction. There was an infringement upon a right which a fellow had spent money to build up and which he owned exclusively. [4]

Now, it seems to me that that is the answer to this case, and I would like to have you direct your argument to convincing me that I am wrong there. In other words, assuming, as you have to, that the story is in the public domain, how can you enjoin the studio from coming along and making some reference to that story, even an erroneous one, even

one which goes beyond the story that Mark Twain wrote, even one that if Mark Twain was alive he might stand up and pull his hair about, or as dead he may turn over in his grave about? Now, you have to take the burden of showing me how you get around that point.

Mr. Sokolov: I shall attempt to, your Honor. I know that that is a rather tough point and strong point that I have to overcome. I realized it when I filed the law suit and filed these briefs.

In answer I would say this, if your Honor please: Taking this WOR case there is no question that this radio station had the exclusive right to that trademark or trade name WOR. I think the cases that I have cited in my brief where I point out the development of the law, I don't think there is any question now that this same radio station WOR could license this very man who established a cleaning place to use the initials WOR.

The Court: I will go along with you on that.

Mr. Sokolov: I still think if this same radio station [5] had licensed, in addition to this cleaning establishment, a half dozen other people to use the initials WOR in connection with their particular businesses, I think they had a perfect right to do that, and the remainder covering any other field was still the exclusive right of WOR. In other words, by the mere fact of having licensed one or two or several people to use those initials WOR in connection with their business, they did not by that action divest themselves of the exclusive right to

still license, control and assign those initials, because it belonged to them.

I say this, and I don't know whether the court will go along with me on it, but I think it is logical: I think we have the same situation in the case of property getting in to what we call public domain. Here we have the example I stated to you, we have the exclusive owner of WOR actually licensing or transferring or assigning it to other people in connection with their businesses. Here we don't have that, but we have that license given by the law. In other words, the law says—and I think that is all that the Clemens case cited by defendant in its brief holds, it doesn't go beyond it: that once an author has permitted his property, either by way of failing to publish it or permitting it to—I want to change my statement.

The Court: Publish without copyrighting it.

Mr. Sokolov: Yes, or the copyright protection has [6] expired by reason of lapse of time or the period for which the law gives it protection, it comes into the public domain, the law says that anybody can use it, you, or I, or anybody that has a desire to, can use it. And I say that is comparable to the licensing of it by the original owner of the station WOR. The law has stepped in here and has in effect permitted the license of it. That does not, however, divest the original owner of that same trade-mark with respect to property that he still owns. So I say I think it answers your Honor's argument.

We have this trade-mark—I am not at this mo-

ment, because I don't think the court wants to hear it at this time, going into the question of whether it is a valid trade-mark or whether it was properly registered, or all the other arguments counsel has raised as to its invalidity, but we are assuming for the moment that it is a valid trade-mark, that the estate of Clemens or the successors to the estate of Clemens had a right to register it and it is a valid trade-mark. And I say that if it is a valid trade-mark with respect to property that they still own, and it is still their exclusive property and cannot get into what we call public domain, the law gives it continued protection on the remainder or what has been reserved to them, despite the fact that the law now says, with respect to this particular property, "The Jumping Frog of Calaveras County," which is in [7] the public domain, "We won't give you any protection with respect to the trade-mark or trade name of Mark Twain."

The Court: Let me ask a question right there in trying to follow along: Supposing that Columbia Pictures instead of making the picture, "The Best Man Wins," had made a picture and called it "The Jumping Frog of Calaveras County," by Mark Twain, and it limited the story exactly to the elements of the story written by Mark Twain, maybe a short——

Mr. Sokolov: I don't think I would have a chance in filing a law suit.

The Court: You concede that?

Mr. Sokolov: Yes.

The Court: Now, what have they done? They have taken a part of the short story and they enlarged upon it and put a love interest in it and made a different story, still maintaining something about the frog and the buckshot and the name of the principal characters and a few things. In other words, most of the Mark Twain story was there, but it has been enlarged upon and they put a different emphasis upon a part of the story. They have given it a different name. Being in the public domain, you probably would concede that if they used the same story, instead of calling it "The Jumping Frog," they could have called it "The Saga of James Smile," or what was his name?

Mr. Kaufman: James Smiley. [8]

The Court: Supposing they just used a different name, do you contend you would have a law suit?

Mr. Sokolov: Except I don't go along with your Honor that in this case they took the story of "The Jumping Frog" and enlarged it or made some modifications. Our contention is that what they did had no bearing or resemblance or relationship to "The Jumping Frog of Calaveras County." They took a very small, minute incident in it, and I say from the factual standpoint it is not as your Honor has described it nor have I so alleged it. If they take a piece of property written by two strangers over there who have no literary worth or reputation in this or any other community, and they write a very mediocre literary product, and merely take a small incident from a famous writer like Mark Twain and

base a picture on that, and then try to palm off on the public that it is something that Mark Twain has written, the obvious reason for it is to get the benefit and the advantage of the name and reputation and the popularity and drawing power of Mark Twain. I say that is a wrong which we should be redressed for and compensated for.

The Court: Let's assume for argument, and just for argument now because I haven't seen it and all we have are these pleadings, that they wrote a "lousy" story, and let's assume for argument that they did all you said they did, they put a couple of hacks to write a story that doesn't sound [9] like the Mark Twain story, but they have written the name Mark Twain in and they are playing on his fame and popularity, and let's assume it is a wrong on the public, they are being defrauded, still the question exists, where is your plaintiff's cause of action.

As I get your theory it rests upon the ground that this trust has in substance claimed a trademark by the use of the words "Mark Twain," and have some copyrighted works, and also have other products on which you license this name, "Mark Twain." Your contention is bolstered by your cases on confusion as distinguished from outright competition.

Mr. Sokolov: That is right. And also——

The Court: But where is the cause of action?

Mr. Sokolov: The cause of action, I think—has your Honor referred to those cases such as the

Washboard cases and others where they say if a retailer buys a product from a manufacturer for resale and some third person misrepresents its own product as being the product of the manufacturer, that the retailer cannot sue and it is only a matter for the manufacturer to seek redress, are you referring to that specifically, your Honor? Because if you are, I think the answer to that is the language in the Lanham Act after the Washboard cases, and two or so other cases. The court in one of those cases—I don't know which one, it has been some time since I read them—specifically said that we think the public has [10] been imposed upon and it is a fraud upon the public, but we think it is not for the retailer to complain, nor has he got a cause of action, and is something that should be cured by Congress or by legislation. But I think it has been cured now by the Lanham Act, Section 1125, I think it is. This is Section 1125 of the Lanham Act, 15 U.S.C.A. This section gives any person a cause of action against one who misrepresents or who believes that he is or is liable to be damaged for the use of any such false description or misrepresentation.

I think that language was purposely put in the new Lanham Act to take care of the Washboard cases and the situations of that kind where now the same retailer would have a cause of action if he could prove that he is or he probably may be damaged by their false misrepresentation.

The Court: If your plaintiff was putting out

films and on the films was either putting the name "Mark Train" or going along with the broader construction of the law, using it in connection with the films even though it wasn't put on the films, that is one instance; or if your plaintiff was making a tri-cycle and calling it the Mark Twain tri-cycle, and this defendant was making some product in that field or any article that was something apart from a literary property, in either of those two instances you would come closer to stating a cause of action. But it is an awfully big jump for [11] me to see where you can say "We are claiming the trademark 'Mark Twain' and using it on other products, and we are using it in connection with some of the works we have copyrighted."

Now, the defendant takes a literary product that has not been copyrighted, mutilates it and deforms it and all that, but it is still in the field of literary property, and then you are contending that the plaintiff has a right to restrain him.

Mr. Sokolov: Because he says it is Mark Twain property. The defendant here, if it had only gone to the extent of saying, "based upon a Mark Twain property," I think it would be something that your Honor could safely say that I don't think that there is a cause of action. But as I have alleged here, they have gone beyond that and have advertised quite extensively, "A story only that Mark Twain could write," which is one of the ads that appeared in the newspapers, and which I have alleged in my complaint, or "Mark Twain's famous story."

I don't know what else a person could do to misrepresent and trade on someone else's property or name to establish a cause of action.

We have a lot of unpublished material which we intend to sell. Mark Twain has never published it, the estate has never published it. We intend to market it. Now we go and offer that to the open market and say, "We have a Mark Twain [12] property which we want to sell." The minute we mention "Mark Twain" irrespective of the content of the literary material, it has a certain definite value, just like you say, "A song written by Irving Berlin," and the same as you say, "A Hopalong Cassidy picture." Irrespective of the content of the picture it has a certain value that that same picture would not have if it was Joe Doakes' picture or if it was a song written by some unknown hack in, I forget the term they use, some alley in New York, yes, Tin Pan Alley. I say I think we can prove damages to the extent that if we say, "This is a Mark Twain property," and someone says, "I saw a Mark Twain story called 'Best Man Wins,' was that a lousy picture, I didn't think Mark Twain was capable of writing a piece of tripe like that," we can't say, "Mark Twain didn't write it." Oh, no, it was publicized all over the world, all over the country. And I think that the defendant has gone far beyond the license that a motion picture producing company or any author would have, or publisher would have, in trying to identify a certain product as being the product of someone

else, or based upon a very famous novel or very famous story.

I say if they had merely said, as they did in some of their advertisements, "Based upon Mark Twain's property, 'The Jumping Frog of Calaveras County,'" I think I would have a very difficult situation. But they didn't stop there. They [13] said, "'Best Man Wins,' Mark Twain's famous story, a story only Mark Twain could write."

The Court: You don't seriously argue that even if this is a bad picture it will dim Mark Twain's fame or his claim to mention in literary fame, do you?

Mr. Sokolov: No, but I claim it will depreciate the value of the literary property we have to sell. We are licensing the motion picture studios for Mark Twain's property that is not in the public domain, and we are getting very fancy prices, and I say those prices will not be forthcoming if they say they can write anything they want, all they have to do is get some small incident no matter how inconsequential and no matter how minute, of something written by Mark Twain, and if this court says there is no cause of action they can say, "The court has given us sanction to write any piece of tripe we want, just put in some line of literary property written by Mark Twain and say this is a Mark Twain property." I say we won't be able to sell our property to the motion picture studios, and I think we have a cause of action and I think we have been wronged and I think we can show it.

The Court: I was trying to think of some analogy. Supposing a musician wrote a very fine composition, but he didn't copyright it, so it was in the public domain, and to make it a little easier, let's assume he is alive. You have [14] another problem in this case, too——

Mr. Sokolov: May I interrupt, your Honor? I told counsel before the argument started on the question of moral rights here I will have to concede only for the reason that I am convinced that it is a personal right, otherwise I would not concede that we have no cause of action based on moral rights, simply because it is not the law in this country. It is the law in foreign countries, and some day sooner or later, I don't know whether your Honor will be the one to start it, but sooner or later someone will blaze a trail establishing moral rights in this country, despite the fact that judges and courts prior to this time in this country have not seen fit to blaze the trail.

The Court: You selected an awfully green judge to do any trail-blazing in a copyright and trademark matter.

Mr. Sokolov: Sometimes they are the best, and a lot of law has been made by a lot of so-called green judges.

The Court: Let me finish my analogy. A musician writes this piece of music and he is still alive, so your moral right exists, he doesn't copyright it, so some hack orchestra goes out and plays it, they play every note, but they do a "lousy" job of

playing it, and immediately the press picks up the performance and broad headlines proclaim what a terrible piece of music this was, and the writer of the music is still alive, would he have any cause of action against those [15] musicians for "butching" up his piece of music?

Mr. Sokolov: Your Honor, I just can't follow that analogy, because if someone came along and read Mark Twain's "Jumping Frog of Calaveras County," and read it in the most horrible manner that anyone is capable of reading anything, and butchered it up to the extent where a person couldn't understand one word of what he said, as long as it was "The Jumping Frog of Calaveras County," and in your example as long as it was the composition written by this famous musician, irrespective of how they rendered it, I don't think there would be a cause of action. But if they took that composition and only used one or two notes, or let's say one or two phrases of it, and then the entire rendition by this ham orchestra was music that this composer never would have dreamt of writing, I think we have a different situation.

The Court: I think maybe you have answered my example. There is a difference, I can see that, from your explanation. Of course, we don't reach that for the reason that you concede that you don't have a cause of action based upon this moral right.

Mr. Sokolov: Yes.

The Court: Unless this court wants to go ahead and, as you say, blaze a trail.

Mr. Sokolov: Yes. But I don't think the court can in [16] this instance, because I am not even going to impose that trouble on your Honor, because I am convinced that it is a personal right.

The Court: Your cause of action, as you see it, hinges largely on what we have been talking about, whether or not you have a copyright, having in mind the broad provisions of the Lanham Act?

Mr. Sokolov: That's right.

The Court: Well, you haven't persuaded me, counsel. I don't think you have it here.

Mr. Sokolov: I am sorry my client picked a lawyer who was not more persuasive than I am.

The Court: No, I think you pretty well squeezed the lemon dry in that brief. I think you did all you could with what you had to work with.

Let me ask this question. Are you content with this complaint? Does this complaint set forth your strongest cause of action that you think you can make?

Mr. Sokolov: I have to be honest with your Honor. I couldn't strengthen it any more. I may be able to change language, but as far as the essential allegations are concerned I have to be honest with your Honor that I couldn't strengthen it.

The Court: Rather than grant a motion to strike, which would merely butcher up the complaint, what I am [17] inclined to do is grant an overall motion on the thing, and if you have a cause of action, and the Circuit Court thinks you have you will be in a stronger position, then, to present it, will you not?

Mr. Sokolov: Your Honor, may I get one thing clear? Are you deciding on the basis that there is no valid trade-mark, or on the basis that there is no unfair competition, or both? The reason I am asking that is this: This case was originally filed in the State Court. There was a petition to remove, and the reasons given for removing it to the Federal Court were that it involved a question of United States trade-mark, and (2) that it involved certain questions of copyright. We are all aware of the fact that it does not involve any question of copyright in this complaint other than I recite we have certain copyrighted material which is being impaired by some action of the defendant. So it certainly could not have come into Federal Court based on my copyright allegations. The only basis in Federal Court would be on my allegations with respect to United States trade-mark.

The Court: Unless you get in under that, you are not in on unfair competition.

Mr. Sokolov: That is why I am asking these questions. If your Honor decides that it is not a valid trade-mark, or even though it was registered as a trade-mark it was not [18] capable of being a valid trade-mark by reason of it not being exclusive, or by reason of its being descriptive, or some of the other reasons advanced by counsel in his brief, the court has no jurisdiction and I orally make the motion to remand it back to the State Court.

The Court: I don't know where this is going to lead us, and you gentlemen can help us out on

it. My conclusion on the thing is that this matter of the trade-mark is the essence of the whole case, and you are not in court unless you have a cause of action on trade-mark. If you are in court on trade-mark, then you are in court on unfair competition. I don't think you are in court on trade-mark. And I base it largely on the fact that you have no exclusive right to the use of the name "Mark Twain" for the reason that in the public domain there is historic material with the name "Mark Twain" which belongs to everybody. Therefore, I distinguish between some of the cases you rely upon where there was obviously an exclusive right. That is my thinking about the thing. Where does that lead us?

Mr. Sokolov: I think it leads us right back to the essential point that the Federal Court has no jurisdiction, and therefore a motion to remand to the State Court is proper.

The Court: Your cause of action on unfair competition would be a proper cause of action in the State Court. [19]

Mr. Sokolov: Unquestionably.

The Court: What about your cause of action on trade-mark? You can't maintain that in the State Court, can you?

Mr. Sokolov: Not my federal registration. But we have that trade-mark registered in every state in the Union. I may either eliminate it or may merely confine my allegations to the fact that it is not a United States trade-mark. I will have to

eliminate it, that is all. But I still think we have a good cause of action in the State Court.

The Court: Your suggestion is that my order would be to hold that this court has no jurisdiction and that the case is therefore remanded to the State Court?

Mr. Sokolov: Yes.

The Court: What do you think of that, counsel?

Mr. Kaufman: Well, your Honor, I think the court has jurisdiction, in view of a few cases which I have run across. *Hurn v. Oursler*, for example——

The Court: I have that case in mind. What do you spell out of that case, by the way?

Mr. Kaufman: That was a copyright case, and they held if the Federal Court had jurisdiction of the copyright matter it also had jurisdiction of the common law unfair competition cause of action based on substantially the same facts.

That case was followed by another Supreme Court case, [20] the *Armstrong* case. *Armstrong*—the paint and varnish case, I forget the principal word in the title. I will give it to you in just a minute. That involved a trade-mark, as this does, and the court held that even though they ruled adversely to the plaintiff on the trade-mark aspect of it, they held that the plaintiff's trade-mark "Nu-Enamel" was descriptive and therefore not entitled to registration, but they held, nevertheless, plaintiff had alleged registration under the federal laws and therefore that is a federal question. Since it is a

federal question they retained jurisdiction over the unfair competition aspect based on substantially the same facts.

The Court: That Hurn v. Oursler case is going to wind up by being some kind of a leading case. We ran onto it in Bell v. Hood, a different kind of case entirely. Bell sued Dick Hood of the F.B.I. for allegedly falsely arresting this fellow Bell of Mankind United. Judge Jenney granted a motion of the United States who was defending Hood on the ground that the court had no jurisdiction. A direct appeal was taken to the Supreme Court and the Supreme Court reversed, citing Hurn v. Oursler and saying that the court had jurisdiction to determine whether or not a cause of action was stated. It is getting along close to what you are talking about. The case then came back, and, very frankly, I read that case Bell v. Hood a dozen times and read Hurn v. Oursler, and it is [21] hard to figure out what the Supreme Court is talking about. But when it came back before Judge Mathes we then made a motion to dismiss on the ground no cause of action was stated. Judge Mathes granted it.

Apparently Hurn v. Oursler and Bell v. Hood, which followed it, held that a court may have jurisdiction to, in substance, say it has no jurisdiction, and jurisdiction to say that facts sufficient have not been stated to bring the case within the court's jurisdiction

Mr. Kaufman: I don't think this court can possibly say it has jurisdiction of no cause of action.

It has jurisdiction, certainly, of the trade-mark cause of action, and must rule that a cause of action has not, in substance, been stated. But it is a federal question. We must distinguish between them. The court has jurisdiction if a substantial federal question has been stated.

The Court: It has jurisdiction to state that no cause of action has been stated.

Mr. Kaufman: That's right, I think that is the proper way to put it. And I think this court must say it has jurisdiction at least to that extent, and rule on the merits of the allegations with respect to trade-mark. Then I urge that *Hurn v. Oursler* and the *Armstrong* case, which really is more in point, gives this court jurisdiction over the unfair competition, and the court should rule on the merits of that [22] cause of action as well.

The Court: How does that affect the result? There are two different jurisdictions, State and Federal. Supposing this court holds that no cause of action has been stated in either of the causes of action, doesn't plaintiff still have his remedy in the State Court by refileing it?

Mr. Kaufman: I think not. I think if this court rules on both of them, on the merits, if this court says that plaintiffs have stated no cause of action for trade-mark and have stated no cause of action for unfair competition, that ends it. If he would file in the State Court thereafter, we would file a defense of *res judicata*, because the court has jurisdiction by virtue of the existence of a federal

question. If the court would just look at that Armstrong case, it is spelled out there with respect to trade-mark, very particularly.

The Court: Do you have the citation?

Mr. Kaufman: Do you have the Law Edition Series? It is 305 U. S. 350.

The Court: What do you think of that, Mr. Sokolov?

Mr. Sokolov: I am not familiar with the case, but I don't think counsel is correct. I don't think that your Honor has gone to the extent of saying that I have not made out a cause of action on unfair competition, particularly in view of the Lanham Act. I think your Honor has stated that [23] you don't think that there is a valid cause of action under the trade-mark title because my clients do not have the exclusive right to the name "Mark Twain." And if your Honor rules that this court has no jurisdiction because of the trade-mark allegations, it cannot entertain, according to counsel's own brief, the cause of action based on unfair competition, even though it states a valid cause of action on unfair competition, because unfair competition standing by itself, not coupled with a federal question, the court cannot entertain the so-called valid cause of action based on unfair competition. Not that the court has no jurisdiction——

The Court: There is another consideration, too, counsel, that we should keep in mind. That is, you were moved into the Federal Court against your will.

Mr. Sokolov: That is right.

The Court: You elected to sue in the State Court. The defendant brought you into the Federal Court on a removal. Is that right?

Mr. Kaufman: Yes.

The Court: Now, if you do have a cause of action in unfair competition in the State Court, certainly there should be some way that the door wouldn't be shut in your face because of the fact that he brought you into this forum.

Mr. Sokolov: He brought me in here saying that I have [24] alleged a trade-mark cause of action. He comes in here and says my trade-mark is no good, there is no jurisdiction in this court to entertain the trade-mark cause of action.

The Court: Then he wants to go further and say having got you into this court and having knocked you out on your trade-mark, you are knocked out on your unfair competition.

Mr. Sokolov: That is it.

The Court: If that is the result that is following, that looks to me a little unconscionable. What do you think about that, counsel?

Mr. Kaufman: Your Honor, I don't know. I was urging that the court not just shut the door in counsel's face, but rule on the merits of the unfair competition. But it may be that if this court remands, then plaintiff's right in the State Court would be merely to urge the unfair competition, leaving out any reference to the federal question, or else it would be subject to removal once more.

Mr. Sokolov: I guarantee you I will not raise any federal question.

The Court: Of course, counsel, your motion is in the alternative. You have made a motion to dismiss each cause of action both upon the ground of no jurisdiction and upon the ground that no claim has been stated.

Mr. Kaufman: That is right. There is no dispute, is there, your Honor, that this court will dispose of the trade-mark [25] cause of action on its merits?

The Court: Well, as I remember that *Hurn v. Oursler*, it is that we have jurisdiction to say that no cause of action is stated, whatever that means.

I was just looking at 1441 (c) of Title 28. It does not help us, probably, but it says:

“Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action,”——

that would be unfair competition——

“the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.”

What does that last mean?

Mr. Kaufman: Would your Honor please read that portion again?

The Court: * * * the entire case may be removed

and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.”

Mr. Sokolov: This case would be to remand the unfair competition cause of action. [26]

Mr. Kaufman: Well, your Honor, I think the philosophy of permitting the court to hear the entire case is to prevent piecemeal litigation. In other words, if a man comes in here and states a cause of action for trade-mark or attempts to, he should also be heard on the merits as to the unfair competition which relates to the same facts. That was the holding in the Armstrong case very directly, that was the holding of the Hurn case in connection with copyright.

Mr. Sokolov: How do you reconcile that with the cases where the courts have held since there was no jurisdiction with respect to federal trade-mark, and the only thing left was unfair competition, and since you must have a federal question involved, then the whole case fell?

Mr. Kaufman: There are no such cases that I know of except two, and those were expressly overruled by the Hurn case.

The Court: The reviser's notes may give us some help here.

Mr. Kaufman: Is that 1441 (c) ?

The Court: Yes, under 1441.

“Rules 18, 20, and 23 of the Federal Rules of Civil Procedure permit the most liberal join-

der of parties, claims, and remedies in civil actions. Therefore, there will be no procedural difficulty occasioned by the removal of the entire action. Conversely, if the court so desires, it may remand to the State Court all non-removable matters.”

That is undoubtedly what they meant by that language in the latter part of 1441.

Mr. Kaufman: Your Honor, the question then boils down to should this court exercise its discretion by sending back the unfair competition aspects of this whole matter? And we urge that this court should not, but should rule on it here. Because if it were going back to the State Court and the State judge would hear exactly the same arguments, the same facts, it would be just repetitious of what we have gone through here. It seems to me this is an ideal case for retaining jurisdiction.

The Court: I conclude from three minutes’ study, which is not the way to make a conclusion, that what this means is that if there was jurisdiction in this court to rule on the trade-mark matter, there is also jurisdiction, if the court wants to exercise it, to rule on the unfair competition matter; or, in the alternative, it having been a non-removable matter this court may remand it to the State Court. It seems to me this court has that discretion.

Mr. Kaufman: I believe it has, and we are simply urging the court to exercise discretion in ruling on it here, because [28] it has heard the argument. The same questions exist as to both theories.

The Court: That would all be good if it were not for this situation I am talking about, where you bring the plaintiff into this court and stick his neck on the block and his head is chopped off on the one cause of action, and then you want to execute him on the second cause of action. He didn't choose this forum. That is the only thing that bothers me about it.

Of course, from the plaintiff's standpoint, I don't know but what you are just as well off with an appeal to the Circuit Court of Appeals as you would be to retry this in the State Court.

Mr. Sokolov: If your Honor please, I prefer——

The Court: In which event you could review in one cause the rulings on the two causes of action. If this is sent back piecemeal you would still have an appeal from my ruling on the trade-mark end of it. If you get tossed out in the State Court you would have to have a separate appeal on the unfair competition.

Mr. Sokolov: If your Honor please, I am in a position where I haven't any choice. I have had certain instructions from my clients. One of the plaintiff's attorneys here is a firm of attorneys, the other trustee is also represented by counsel who give me certain specific instructions. Frankly [29] they were adverse to this matter being removed to the Federal Court and have written me letter after letter trying to get it remanded to the State Court.

The Court: Do you make any objection to his oral motion for remand?

Mr. Kaufman: Yes, your Honor, we object to it.

The Court: I am talking merely about the form of it, the fact that it is made orally, rather than in writing?

Mr. Kaufman: No, we have no objection to the form.

The Court: The order of the court is going to be this: I hold that I have jurisdiction over the cause of action involving trade-mark, and on the basis of *Hurn v. Oursler* and *Bell v. Hood*, and the *Armstrong* case, I hold that no cause of action is stated on trade-mark.

I interpret Section 1441 and the Reviser's Notes to mean that I have discretion to remand to the State Court the non-removable cause of action on unfair competition. Your copyright cause of action is out, anyhow. Accordingly, I direct a remand of the cause of action on unfair competition to the State Court.

I am motivated by one other consideration besides Section 1441 and the Reviser's Notes thereto, and that is the matter that I have just mentioned, namely, that the plaintiff was brought into this court on removal proceedings through no act of his own, and that he had originally elected to file [30] his suit in the State Court; therefore I think he should have the chance to pursue his remedy on unfair competition in the State Court.

I also hold that the cause of action on copyright, whatever the number of it is, fails to state a cause of action.

You have three causes of action——

Mr. Sokolov: One on the so-called moral rights, one on unfair competition, and one on infringement of trade-mark.

The Court: I hold that the alleged cause of action on moral rights fails to state a cause of action.

Can we designate it for the clerk so that he will know? Which is your unfair competition cause of action, the third?

Mr. Sokolov. It is pretty hard. I have got it interwoven all the way through. I would rather the court wouldn't designate which particular cause of action.

The Court: We will not designate them by particular causes of action except as to the substance thereof.

Mr. Kaufman: Your Honor, before we adjourn may I be heard briefly on the question of how your discretion should be exercised?

The Court: Yes.

Mr. Kaufman: Section 1441(c), as you have read it, expressly contemplates a situation where a matter has been already removed from the State Court to the Federal Court. So in all cases coming up under Section 1441 the court has [31] jurisdiction—I mean the court has the choice of electing to keep it all or send part of it back, and in all of the cases coming up under that section the plaintiff has been deprived of the choice of forum which he exercised. That is contemplated every time a court must make a decision under 1441.

What I have in mind is your Honor giving as a ground for his decision the fact that plaintiff originally wanted to be in the State Court. The plaintiff wanted to be in the State Court in every case which comes up under 1441, so that is no reason for exercising the court's discretion one way or the other. It seems to me the real basis for exercising discretion is what is expedient, what would avoid repetition. In this case it is pointed up because the allegations relating to trade-mark and the allegations relating to unfair competition are in substance and in form so interwoven that you can't separate them, that is the type of thing that was contemplated in *Hurn v. Oursler* and the *Armstrong* case. If the court remands the unfair competition aspects of this case, I can't conceive of a single case where it should keep jurisdiction of the whole matter. Everything points——

The Court: There is a lot of logic to your argument. The distinction between the cases that fall under the *Hurn v. Oursler* rule and the other cases are those, on the one hand, where the same set of facts is relied upon, really, for [32] two separate causes of action, and in the second category is the case where you have one cause of action on which there is federal jurisdiction and another cause of action which tags along and can be heard by this court because it does have jurisdiction of the first, but which second cause of action is not a part of nor inseparable from the first cause of action. Is that right?

Mr. Kaufman: That is right. And in this case they are inseparable, because the same acts which we are accused of doing constitute plaintiffs' cause of action for violation of trade-mark and also for unfair competition.

The Court: I will tell you, since you make objection I am going to read those cases further. I am going to reread the *Hurn v. Oursler* case and study this note a little bit further, and instead of making a three-minute decision I will see what should be done.

Mr. Kaufman: I might point out one more thing. In connection with 1338(b), which I refer to where they stated the court shall have jurisdiction of unfair competition when joined with a cause of action for trade-mark, 1338(b) of Title 28, the Reviser's Notes indicate the purpose which should guide a court by pointing out that we want to avoid piecemeal litigation, we don't want to hear the same thing partly here and partly in the State Court.

Mr. Sokolov: We haven't gone into the merits of unfair [33] competition. You keep saying that you will hear this thing piecemeal. The court has only ruled on the question of jurisdiction.

The Court: I am going to set aside the order I made with the one exception: I hold that no cause of action is stated on trade-mark, and the court has jurisdiction to so determine. That is all I hold presently. The rest of it I will take under submission and decide after I read the notes and the cases.

The Clerk: Are you staying the entry of formal order on that?

The Court: Yes, I am just indicating that part of my ruling, and I will give you a minute order after I read these cases.

Mr. Sokolov: I wish to make one statement, if your Honor please. I don't think it is quite accurate when counsel says that I will have to rely on the same set of facts to establish my unfair competition cause of action as I did on the trade-mark. I think I can safely establish my unfair competition cause of action without any basis or relationship to whether or not we have a trade-mark on "Mark Twain." To that extent I think it differs from the cases that counsel has cited.

Mr. Kaufman: I have no dispute with what you said, but whether or not you have a trade-mark is a legal question. I [34] am talking of the facts.

Mr. Sokolov: I won't have to rely on "Mark Twain" in my unfair competition.

Mr. Kaufman: But you accuse us of making certain representations. Those representations are the only ones that you can rely on, because they are the only ones you have pleaded.

Mr. Sokolov: That is right.

Mr. Kaufman: They are alleged both to violate the trade-mark and to constitute unfair competition. In that sense the only acts we did violate two rights which you claim to have, one in trade-mark and one in unfair competition. As the Supreme Court said, it is just two different epithets for the same wrong.

The Court: All right. The matter will be taken under submission.

Mr. Kaufman: Your Honor, I served counsel with a supplemental memorandum of just one case which summarizes a lot of the cases I set forth in my brief, and I think it would be helpful if I may file it.

The Court: You may file it with the clerk.

Mr. Sokolov: I wish to thank your Honor for your consideration. I know it is an unusual and rather difficult problem.

The Court: Thanks for your very exhaustive briefs on [35] the matter.

Mr. Sokolov: I thought I had to have an exhaustive brief, because a lot of law had to be read to try to establish it. [36]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of May, A.D. 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed May 19, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 130, inclusive, contain the original Petition for Removal; Amended Complaint for Injunction, Unfair Competition and for an Accounting and Damages; Notice of Motions to Dismiss and to Strike from Amended Complaint and Memorandum of Points and Authorities; Plaintiffs' Statement and Answering Memorandum of Points and Authorities in Opposition to Defendant's Motions to Dismiss and to Strike from Amended Complaint; Defendant's Closing Memorandum in Support of Motions to Dismiss and to Strike from Amended Complaint; Defendant's Supplemental Memorandum in Support of Motions to Dismiss and to Strike from Amended Complaint; Order of Dismissal; Notice of Entry of Dismissal; Notice of Appeal; Order Extending Time to Docket Appeal; Designation of Contents of Record on Appeal; Designation of Additional Contents of Record on Appeal and Order Extending Time to File Record and Docket Appeal which, together with original reporter's transcript of proceedings on January 30, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 22nd day of May, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed): No. 12554. United States Court of Appeals for the Ninth Circuit. Thomas G. Chamberlain and Central Hanover Bank & Trust Company as Successor Trustees under the Last Will and Testament of Samuel L. Clemens, deceased, Mark Twain Company and Clara Clemens Samosoud, Appellants, vs. Columbia Pictures Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12554

THOMAS G. CHAMBERLAIN and CENTRAL
HANOVER BANK & TRUST COMPANY as
Successor Trustees Under the Last Will and
Testament of Samuel L. Clemens, deceased,
MARK TWAIN COMPANY and CLARA
CLEMENS SAMOSSOUD,

Appellants,

vs.

COLUMBIA PICTURES CORPORATION, a
Corporation, DOE ONE, DOE TWO and DOE
ONE CORPORATION,

Appellees.

POINTS ON WHICH APPELLANTS INTEND
TO RELY, AND DESIGNATION OF
RECORD

To the Clerk of the Above-Entitled Court:

The appellants intend to rely on the following points:

1. The trademark "Mark Twain" is a valid trademark under the laws of the United States, and that Appellants have stated a cause of action against the Appellees for infringement of the Federal Trademark Act.

2. That Appellants have stated and alleged a cause of action for unfair competition, and the Dis-

trict Court was in error in dismissing Appellants' cause of action upon the ground and for the reason that the amended complaint failed to state a claim upon which relief could be granted.

The appellants designate the following portions of the record, proceedings and evidence, which is material to the consideration of the appeal in the above cause:

1. Plaintiffs' Amended Complaint for Injunction, Unfair Competition and for an Accounting and Damages.

2. Defendant's Notice of Motions to Dismiss and to Strike from Amended Complaint and Memorandum of Points and Authorities.

3. Plaintiffs' Statement and Answering Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss and to Strike from Amended Complaint.

4. Defendant's Closing Memorandum in Support of Motions to Dismiss and to Strike from Amended Complaint.

5. Defendant's Supplemental Memorandum in Support of Motions to Dismiss and to Strike from Amended Complaint.

6. Order of Dismissal, dated February 7, 1950, signed by James M. Carter, District Judge of the above-entitled Court.

7. Reporter's transcript of hearing of Appellees'

(defendant's) motion to dismiss the amended complaint, said hearing having been had on January 30, 1950.

8. Notice by Clerk of Entry of Judgment, dated February 8, 1950.

Notice of Appeal. Clerk's Certificate.

Dated: May 31, 1950.

/s/ HARRY E. SOKOLOV,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 1, 1950.

No. 12554.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS G. CHAMBERLAIN and CENTRAL HANOVER BANK
& TRUST COMPANY, as Successor Trustees under the
Last Will and Testament of SAMUEL L. CLEMENS,
deceased, MARK TWAIN COMPANY and CLARA CLEMENS
SAMOSSOUD,

Appellants,

vs.

COLUMBIA PICTURES CORPORATION,

Appellee.

APPELLANTS' OPENING BRIEF.

HARRY E. SOKOLOV,
6253 Hollywood Boulevard, Los Angeles 28,
Attorney for Appellants.

FILED

JUL 31 1959

WILLIAM R. JENNINGS



TOPICAL INDEX.

	PAGE
I.	
Pleadings	1
II.	
Statement of the case.....	2
III.	
Specification of errors relied on.....	8
IV.	
Argument	9
A. As to the validity of the trademark "Mark Twain".....	10
B. As to unfair competition.....	15

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. 2d 685.....	22
Apollo Bros. v. Perkins, 207 Fed. 530, 125 C. C. A. 192.....	13
Burton v. Stratton, 12 Fed. 696.....	13
Clemens v. Belford, 14 Fed. 728.....	14, 15, 28
Drive It Yourself Co. v. North, 130 Atl. 57, 148 Md. 609.....	13
Dunhill v. Dunhill, 3 Fed. Supp. 487.....	19
Elastic Stop-Nut Corp. v. Greene, 62 Fed. Supp. 363.....	21
Elgin Nat. Watch Co. v. Illinois Watch Case Co., 21 S. Ct. 270, 179 U. S. 665, 45 L. Ed. 365.....	14
Ferguson v. Mills, 7 Phila. 253.....	13
Folmer Graflex Corp. v. Graphic Photo Service, 44 Fed. Supp. 429; new trial granted 45 Fed. Supp. 749.....	14
Godillot v. Hazard, 49 How. Prac. 5; aff'd, 44 N. Y. Sup. Ct. 427; aff'd 81 N. Y. 263.....	13
Grove Laboratories v. Brewer & Co., 103 F. 2d 175.....	13, 14
Henry Muhs Co. v. Farm Craft Foods, 37 Fed. Supp. 1013.....	12
Hercules Powder Co. v. Newton, 266 Fed. 169.....	12
Kellogg Toasted Corn Flake Co. v. Quaker Oats Co., 235 Fed. 657, 149 C. C. A. 77.....	13
Lady Esther, Ltd. v. Lady Esther Corset Shoppe, 43 N. E. 2d 165	21
Manitou Springs Mineral Water Co. v. Schueler, 239 Fed. 593, 152 C. C. A. 427, cert. den. 37 S. Ct. 406, 243 U. S. 645, 61 L. Ed. 944.....	12
Mishawak Rubber, In re, 316 U. S. 203.....	18
Oakland Chemical Co. v. Bookman, 22 F. 2d 930.....	13
Packard Motor Car Co., In re, 46 App. D. C. 555.....	12
Plough, Inc. v. Intercity Oil Co., 26 Fed. Supp. 978.....	12
San Francisco Ass'n for Blind v. Industrial Aid for Blind, 58 Fed. Supp. 995; reversed, 152 F. 2d 532.....	14

	PAGE
Tiffany & Co. v. Tiffany Productions, 264 N. Y. Supp. 459, 260 N. Y. Supp. 821, 262 N. Y. 482.....	19, 20, 23
Uproar v. National Broadcasting Co., 8 Fed. Supp. 358; affd., 81 F. 2d 373.....	23
Vogue Company v. Thompson-Hudson Co., 300 Fed. 509, 12 F. 2d 991, 71 L. Ed. 850.....	19, 22
Vortex Cup Co., In re, 83 F. 2d 821, 23 C. C. P. A., Patents 1166	11
Wall v. Rolls-Royce, 4 F. 2d 333.....	19
Yale Electric Corp. v. Robertson, 22 F. 2d 972.....	23

MISCELLANEOUS

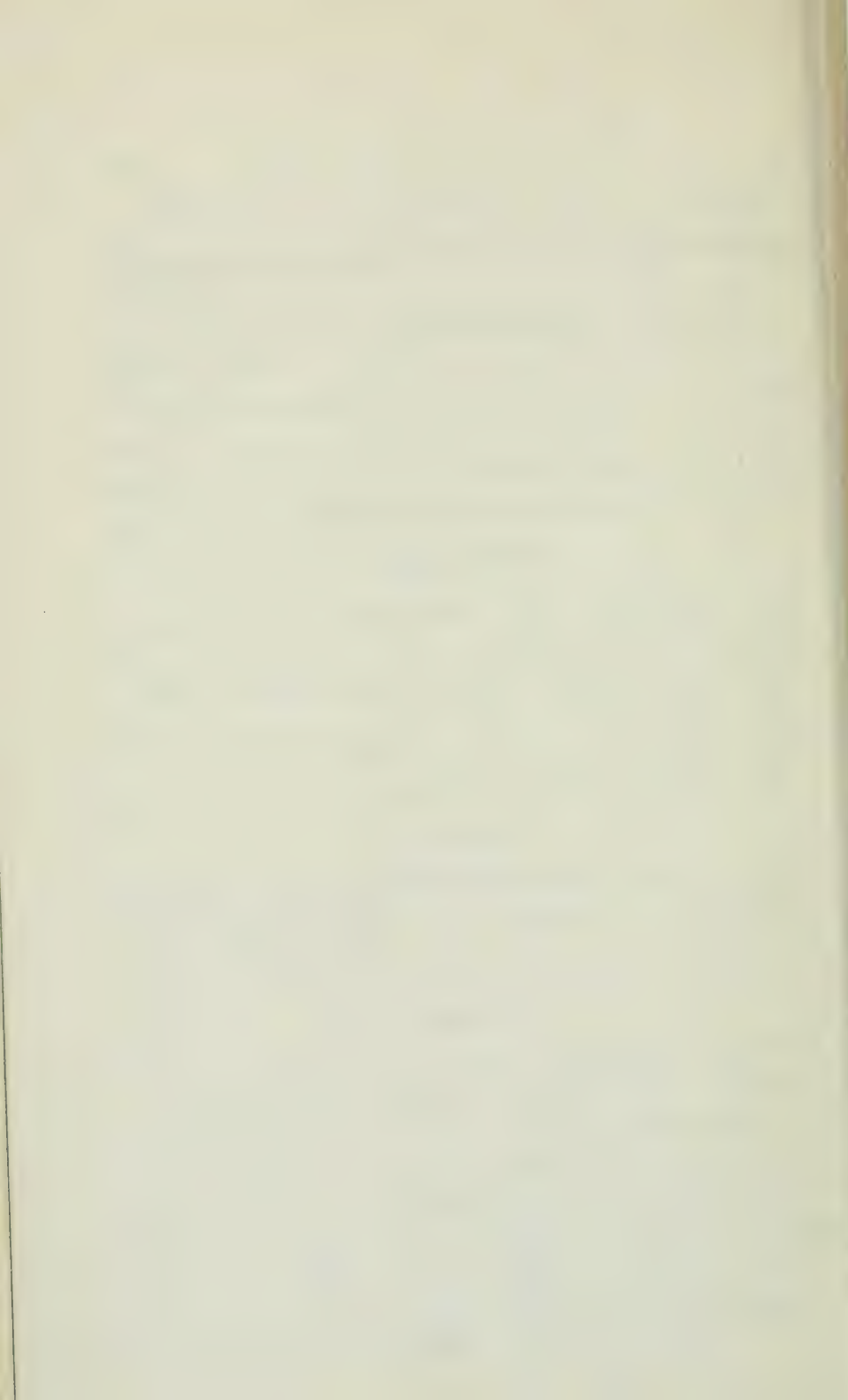
Mark Twain's Favorite Story, Courier Journal, Louisville, Ky., June 11, 1948, p. 4, Section 2.....	4
Mark Twain's Tale of a Gamble in Hearts!, New York Daily Mirror, Oct. 8, 1948.....	4
Mark Twain's Tale of a Gamble in Hearts! New York Daily Mirror (Brooklyn Edition, p. 32).....	4

STATUTES

Lanham Trademark Act of July 5, 1946, Stat. 427.....	2, 7, 10
United States Code Annotated, Title 15, Secs. 1051-1127.....	2, 8
United States Code Annotated, Title 15, Sec. 1125(a).....	2, 8

TEXTBOOKS

38 Harvard Law Review, p. 370.....	21
40 Harvard Law Review, p. 812, Schechter, The Rational Basis of Trade-Mark Protection.....	20
The New Trade-Mark Manual, pp. 5, 6.....	17
The New Trade-Mark Manual, pp. 8, 9.....	18
The New Trade-Mark Manual (Introduction), pp. 14, 15.....	17
2 Unfair Competition in Trade-Marks, p. 1335.....	18, 19
2 Unfair Competition in Trade-Marks, pp. 1336, 1337	20



No. 12554.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS G. CHAMBERLAIN and CENTRAL HANOVER BANK
& TRUST COMPANY, as Successor Trustees under the
Last Will and Testament of SAMUEL L. CLEMENS,
deceased, MARK TWAIN COMPANY and CLARA CLEMENS
SAMOSSOUD,

Appellants,

vs.

COLUMBIA PICTURES CORPORATION,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Pleadings.

The plaintiffs, who are the daughter, testamentary trustees and all other representatives of the Estate of Samuel L. Clemens (Mark Twain), the well known writer who died April 21, 1910, commenced the proceedings against the defendant by filing an amended complaint for injunction to restrain the defendants from the use of plaintiffs' United States trademark "Mark Twain" in connection with a motion picture produced by the defendant, and for unfair competition and for an accounting and damages. [Clk. Tr. pp. 2-16.]

The defendant filed a notice of Motion to Dismiss and to Strike said Amended Complaint. [Clk. Tr. pp. 17-21.] Upon the hearing of said Motion to Dismiss and to Strike, the District Judge granted said motions upon the ground and for the reason that the amended complaint failed to state a claim upon which relief could be granted. [Clk. Tr. pp. 21-22.] It is contended that the District Court had jurisdiction and this court has jurisdiction to review the decree or order in question by virtue of the Trademark Act and particularly the provisions of the Lanham Trademark Act of July 5, 1946, Stat. 427 incorporated in 15 U. S. C. A., Sections 1051-1127, and particularly Section 1125, subdivision (a), 15 U. S. C. A.

II.

Statement of the Case.

The amended complaint for injunction, unfair competition and for an accounting and damages alleges that plaintiffs are the daughter, testamentary trustees and all other representatives of the Estate of Samuel L. Clemens (Mark Twain), the well known writer who died April 21, 1910. That under the Last Will and Testament of Samuel L. Clemens, deceased (Mark Twain) any and all rights in and to literary material written by him during his lifetime, whether published or unpublished and which he possessed at the time of his death, as well as all of the stock of the Mark Twain Corporation, were placed in a trust; that the trustees named and designated in the Last Will and Testament as the trustees for the trust created by said Will, succeeded to any and all rights which the said Samuel L. Clemens had in all literary properties written by him at the time of his death.

That the plaintiffs are the successor trustees of the trust aforementioned, and are now and at all times men-

tioned in the complaint were the sole owners of all of the stock and own and control the said Mark Twain Company, and are now and at all times mentioned in the complaint were the sole owners of literary properties and rights in and to literary properties possessed by Samuel L. Clemens at the time of his death. That the plaintiff Clara Clemens Samossoud is the daughter and sole heir of the deceased Samuel L. Clemens and is named in his Last Will and Testament as the sole income beneficiary of the trust created under the Will during the life of the trust and by the terms of the Will after the expiration of the trust, will succeed to all rights in and to the literary property of Samuel L. Clemens.

The amended complaint alleges that within the past several years plaintiffs have registered the name "Mark Twain" as a trademark in all states and with the United States government and in recent years the plaintiffs have licensed the use of the name "Mark Twain" for literary productions and commercial purposes in connection with non-literary products. That with respect to a great many of the literary properties of Samuel L. Clemens (Mark Twain), deceased, full copyright protection exists in the United States as well as in many foreign countries and that with respect to the literary properties that are so protected by copyright, the plaintiffs are the owners thereof and have the sole and exclusive right to sell, license, or otherwise deal in said literary properties.

The amended complaint further alleges that Samuel L. Clemens (Mark Twain), during his lifetime composed and wrote a short story entitled "The Celebrated Jumping Frog of Calaveras County." That said short story became and still is very popular, and has been at all times mentioned herein, and still is, identified by the reading

public as one of the more famous of Mark Twain's literary properties, and has been known and recognized by the reading public as an outstanding example of the unusual literary style, wit, humor, talents and ability of Mark Twain and his literary writings. That the said story "The Celebrated Jumping Frog of Calaveras County" was not protected by copyright at the time of the filing of the complaint.

That in the year 1948, the defendant Columbia Pictures Corporation, who are engaged in the business of producing, manufacturing and distributing motion picture photoplays, produced and caused to be distributed a motion picture photoplay entitled "BEST MAN WINS" and at the time of the filing of the complaint, said defendant was and is still continuing to cause said motion picture photoplay to be released, distributed and exhibited in thousands of motion picture theatres throughout the United States.

That in connection with the production, distribution, release and exhibition of the said motion picture photoplay, "Best Man Wins," the defendant has advertised, publicized and exploited the aforementioned motion picture photoplay as "One of Mark Twain's favorite stories," and caused to be inserted in various newspapers, magazines, periodicals and motion picture trade papers and magazines, advertising and publicity in various words and phrases indicating that said motion picture photoplay "Best Man Wins" is based on a story written by Mark Twain. for example, "Mark Twain's tale of a gamble in hearts!" which was advertised in the New York Daily Mirror, issue of October 8, 1948, Brooklyn edition, page 32; "Mark Twain's Favorite Story," advertised in the Courier Journal, Louisville, Kentucky, June 11, 1948, page 4, Section 2; "Mark Twain's Lovable Rogue, who would a wandering and a wooing go" (referring to the character

in the picture of Smiley rather than the story), contained in advertising matter appearing in the front of the Orient Theatre, Jersey City, New Jersey, on September 16, 1948; "A Story only Mark Twain Could Tell," appearing on advertising matter in the front of the Orient Theatre, September 16, 1948. From time to time and intermittently, defendant additionally advertised and exploited the motion picture "Best Man Wins"—"That the said picture is based upon the story 'The Celebrated Jumping Frog of Calaveras County.'"

That during his lifetime, the said Samuel L. Clemens, deceased (Mark Twain), never wrote or composed any story or literary property entitled "Best Man Wins."

That the famous story aforementioned, written by Samuel L. Clemens, entitled "The Celebrated Jumping Frog of Calaveras County" is a short story dealing with a single incident in the life of one Jim Smiley. Nothing in this story appears concerning Smiley's life or character, except that it is pointed out that he would bet on anything. In the story, Jim Smiley owns a jumping frog called "Dan'l Webster," and he makes a bet with another man who produces another frog, as to which frog can jump the farthest. Jim Smiley loses the bet because the other man fills "Dan'l Webster" with buckshot so that he cannot jump, and the story ends with Jim Smiley chasing the other man after he finds out the trick that has been played upon him.

In the motion picture photoplay produced, distributed, released and exploited by the defendant as aforementioned, entitled "Best Man Wins," there is a flash at the outset that reads: "Based on the Mark Twain story, 'The Celebrated Jumping Frog of Calaveras County.'"

The character Jim Smiley, who was the central character in Mark Twain's story, is also the central character of the motion picture, but the story itself, is completely different from the Mark Twain story, and actually, the incident which is the center of the Mark Twain story does not appear in the motion picture at all, although the jumping frog, "Dan'l Webster," appears throughout the movie. The frog does get filled with buckshot at the end of the movie, but the incident is entirely different from that set forth in the story by Mark Twain and Jim Smiley states that the buckshot trick was one he "learned in Calaveras County, California." The motion picture tells a very common, ordinary, and what is commonly characterized in the motion picture theatrical industry as "corny" love story. Jim Smiley married the lady of the movie, had a son by her, then deserted her and never even wrote her a letter for about twelve years. Then he showed up again and made a hit with the boy, and later remarried the mother of the boy. During the absence of Jim Smiley, the mother had secured a divorce and had planned to marry another man. In the Mark Twain story there was nothing about the life of Jim Smiley, except that he was a natural born gambler, and would bet on anything, but in the motion picture photoplay, Jim Smiley turns out to be not only a gambler, but a wife deserter as well.

That the motion picture photoplay entitled "Best Man Wins" produced and exhibited by the defendant, is an inferior motion picture photoplay, falsely and untruly representing that Samuel L. Clemens, deceased (Mark Twain), was the author or composer of the story upon which it is based.

That the defendant in producing the motion picture photoplay aforementioned, "Best Man Wins," deformed and mutilated the literary property of the deceased Mark

Twain, entitled "The Celebrated Jumping Frog of Calaveras County," and has advertised, publicized, exploited, and announced to the general public at large that such deformed and mutilated story was in fact the literary composition of Mark Twain, when in truth and in fact, such representations, announcements, publications and advertising were false and untrue, and the defendant well knew them to be false and untrue, and caused such announcements, advertising, publications and exploitation to be made for the sole purpose of deceiving the general public, for defendant's own personal profit and advantage, resulting in damage and injury to the plaintiffs and the property of the plaintiffs.

That by reason of the acts and conduct of the defendant as aforementioned in connection with the production and exhibition and the advertising and publicizing of said motion picture photoplay as aforementioned, great damage has been suffered and irreparable injury has been sustained by the plaintiffs, in that the false, improper, misleading and reprehensible use by defendant of the work of Mark Twain, "The Celebrated Jumping Frog of Calaveras County," has depreciated the value of and the income from the literary works and property of Mark Twain as aforementioned, which are protected by copyright in the United States and certain foreign countries, all to the damage of the plaintiffs in the sum of \$150,000.00.

That by reason of the acts and conduct of the defendants aforementioned, in connection with the production, exhibition, advertising and publicizing of said motion picture photoplay as aforementioned, defendants became liable to the plaintiffs pursuant to the provisions of the Lanham Trademark Act of July 5, 1946, Stat. 427, in-

corporated in 15 U. S. C. A., Sections 1051-1127, and particularly Section 1125, subdivision (a), 15 U. S. C. A.

That by reason of all of the foregoing, plaintiffs prayed:

That the defendant be enjoined from exhibiting the motion picture photoplay produced by it entitled, "Best Man Wins," until it removes from the negative and all positive prints thereof any reference to the fact that same is a Mark Twain story, or based upon a Mark Twain story, whether it be a reference to the Mark Twain story of "The Celebrated Jumping Frog of Calaveras County" or any other Mark Twain story.

That the defendant be enjoined from advertising, publicizing, or otherwise exploiting the aforementioned motion picture photoplay produced and exhibited by the defendant, entitled, "Best Man Wins," in any newspapers, magazines, periodicals, motion picture trade papers or otherwise, that said motion picture photoplay is a Mark Twain story, or is based upon the Mark Twain story, "The Celebrated Jumping Frog of Calaveras County," or otherwise, and it be decreed and ordered that the defendant eliminate any and all reference to Mark Twain in connection with the motion picture photoplay, "Best Man Wins," and in connection with any advertising, publicity, or exploitation in connection with such exhibition of said motion picture photoplay, and further, for an accounting and for damages.

III.

Specification of Errors Relied on.

The Court erred in granting defendants Motion to Dismiss upon the ground and for the reason that the amended complaint failed to state a claim upon which relief could be granted.

IV.

Argument.

The lower court based its ruling on the following grounds:

(1) That plaintiff had no exclusive right to the use of the name "Mark Twain" for the reason that in the public domain there is historic material with the name "Mark Twain" which belongs to everybody, and

(2) There was no unfair competition in what the defendant did by reason of the fact that plaintiffs had no exclusive right to the use of the name "Mark Twain" [Rep. Tr. of Proceedings contained in Clk. Tr., top of p. 42] reading as follows:

"My conclusion on the thing is that this matter of the trade-mark is the essence of the whole case, and you are not in court unless you have a cause of action on trade-mark. If you are in court on trade-mark, then you are in court on unfair competition. I don't think you are in court on trade-mark. And I base it largely on the fact that you have no exclusive right to the use of the name "Mark Twain" for the reason that in the public domain there is historic material with the name "Mark Twain" which belongs to everybody. Therefore, I distinguish between some of the cases you rely upon where there was obviously an exclusive right. That is my thinking about the thing. Where does that lead us?"

See Court's remarks, Reporter's Transcript, contained in Clerk's Transcript, page 55, next to the last paragraph, reading as follows:

"The Court: I am going to set aside the order I made with the one exception: I hold that no cause

of action is stated on trade-mark, and the court has jurisdiction to so determine. That is all I hold presently. The rest of it I will take under submission and decide after I read the notes and the cases.”

A. As to the Validity of the Trademark “Mark Twain.”

In the commentary on the Lanham Trademark Act of July 5, 1946, the new Trademark Act by Daphne Robert, which commentary appears on page 265 of U. S. C. A., Title 15, and on page 271 thereof, Mr. Robert has the following to say:

“The prohibition against registration of geographical names, descriptive words and surnames is also relaxed. Under the prior Act geographical names were not registrable, even though they had little or no geographical significance to ultimate purchasers. If the name was to be found in an atlas or gazetteer, that was sufficient to preclude registration. Descriptive words were likewise denied registration. Surnames were registrable only if they were displayed in a distinctive manner—and the appearance of a name in a telephone directory was sufficient to preclude registration, even though the name had little or no significance as a surname in the market place. Under the present Act if a mark is merely descriptive or deceptively misdescriptive of goods or services, is primarily geographically descriptive or deceptively misdescriptive, or is primarily merely a surname, it may be denied registration on the Principal Register. However, if, through substantially exclusive and continuous use, the mark becomes distinctive and indicates in the market place only the goods or services of the user, it may be registered on the Principal Register irrespective of its original primary meaning. Such marks as ‘Nu-Enamel’ which originally was

descriptive, 'Ford' which originally was a surname, and 'Santa Fe' which originally was geographical, may now be registered as valid secondary meaning marks on the Principal Register."

Plaintiffs have alleged in their amended complaint, Article X thereof [see Clk. Tr., bottom of p. 5, top of p. 6]:

"That the name and mark of Mark Twain has been substantially, exclusively and continuously used in connection with the literary works of Samuel L. Clemens, deceased, during his lifetime, and subsequent to his death in 1910, by plaintiffs who succeeded to the rights in said literary properties, and said mark and name has become distinctive, and indicates in the literary market throughout the world only the literary works and writings of Samuel L. Clemens, deceased."

The former Trademark Act precluded registration of marks or words which were clearly descriptive. However, whether a word used as a trademark is descriptive depends on circumstances in each case. Many cases have been before the courts on this point of what is or is not descriptive, and generally it has been crystalized by the authorities herein quoted below:

"Whether a word used as a trade-mark is descriptive of goods as to which it is used depends on circumstances of each case, and hence mere fact that a word or term has a descriptive meaning does not necessarily mean that its use is prohibited."

In re Vortex Cup. Co. (1936), 83 F. 2d 821, 23 C. C. P. A., Patents 1166.

“A term adopted as a trade-mark must be considered in its entirety in determining whether term is merely descriptive.”

Henry Muhs Co. v. Farm Craft Foods (D. C. N. Y., 1941), 37 Fed. Supp. 1013.

“To justify finding that words are descriptive and that registration of trade-mark is invalid, it must be shown that they apply especially to some ingredient, quality or characteristic of the products to which they are applied.”

Plough, Inc. v. Intercity Oil Co. (D. C. Pa., 1939), 26 Fed. Supp. 978.

“The question of the descriptiveness of a mark must be considered in the light of its significance to the purchaser.”

In re Packard Motor Car Co. (1917), 46 App. D. C. 555.

“The words ‘merely descriptive,’ as used in former section 85 of this title mean only descriptive, or nothing more than descriptive.”

Hercules Powder Co. v. Newton (C. C. A., N. Y., 1920), 266 Fed. 169.

“A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article, to which it is applied.”

Manitou Springs Mineral Water Co. v. Schueler (Colo., 1917), 239 Fed. 593, 152 C. C. A. 427, certiorari denied 37 S. Ct. 406, 243 U. S. 645, 61 L. Ed. 944.

See also:

Oakland Chemical Co. v. Bookman (C. C. A., N. Y., 1927), 22 F. 2d 930;

Kellogg Toasted Corn Flake Co. v. Quaker Oats Co. (Mich., 1916), 235 Fed. 657, 149 C. C. A. 77;

Apollo Bros. v. Perkins (Pa. 1913), 207 Fed. 530, 125 C. C. A. 192;

Burton v. Stratton (C. C. Mich., 1882), 12 Fed. 696;

Godillot v. Hazard (N. Y., 1875), 49 How. Prac. 5, affirmed, 44 N. Y. Sup. Ct. 427, affirmed 81 N. Y. 263;

Ferguson v. Mills (Pa., 1869), 7 Phila. 253.

“Under former section 85 of this title it was intended to restrict only the registration of a mark that is merely descriptive of the goods with which it is used, not one which by use on a peculiar class of goods has come to denote origin.”

Grove Laboratories v. Brewer & Co. (C. C. A. Mass. 1939), 103 F. 2d 175.

“The true test in determining whether a particular name or phrase is descriptive is not whether words are exhaustively descriptive of article designated, but whether in themselves, and, as they are commonly used by those who understand their meaning, they are reasonably indicative and descriptive of thing intended.”

Drive It Yourself Co. v. North, 1925, 130 Atl. 57, 148 Md. 609.

“Former section 85 of this title did not exclude from registration a descriptive mark if applicant had right to use the mark involved and no one else had right to such use in identical form or in such near resemblance as might be calculated to deceive.”

Grove Laboratories v. Brewer & Co., C. C. A. Mass. 1939, 103 F. 2d 175.

“Words that do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership, but which are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trade-mark.”

Elgin Nat. Watch Co. v. Illinois Watch Case Co., Ill. 1901, 21 S. Ct. 270, 273, 179 U. S. 665, 45 L. Ed. 365.

See also:

San Francisco Ass'n for Blind v. Industrial Aid for Blind, D. C. Mo. 1945, 58 F. Supp. 995, reversed on other grounds 152 F. 2d 532;

Folmer Graflex Corp. v. Graphic Photo Service, D. C. Mass. 1942, 44 F. Supp. 429, new trial granted 45 F. Supp. 749.

The plaintiffs are not endeavoring to enlarge their rights in literary property by the device of a trademark, as contended by defendants in their brief in support of its Motion to Strike and Dismiss, and the instant case is distinguishable from *Clemens v. Belford*, 14 Fed. 728, in that plaintiffs in the instant case seek to protect their property right of trademark “Mark Twain,” which trademark is used to designate the origin and ownership of their literary works, which property right has no relationship or bearing to the literary content or literary

material of such works. The *Clemens v. Bedford* case is authority only on the particular point that an author cannot use a *nom de plume* as a trademark to circumvent, enlarge, or enhance his rights to the literary property or the literary material once such literary property or literary material becomes the public property and is in the public domain. Nowhere in this decision does the court enunciate the principle, as defendant contends, that the pseudonym "Mark Twain" is not a proper subject of trademark protection. One must bear in mind in the *Clemens v. Bedford* case (*supra*) that defendant in that case actually copied the work of Mark Twain and used the name of the author. This case did not involve the question of a defendant originating his own work or distorting and mutilating a work of another, and claiming it to be the work of the creator.

B. As to Unfair Competition.

It is plaintiff's contention that it presently owns and controls considerable literary property written by Mark Twain, which is still protected by copyright. That the Mark Twain Estate is receiving considerable income from the licensing of these literary properties, particularly by the licensing of motion picture rights in said properties to producers of motion picture photoplays. That if producers of motion picture photoplays are permitted to take insignificant and very unimportant and minor incidents from those of the Mark Twain properties that are in the public domain and elaborate upon these unimportant and minor incidents and build up an extensive literary property with a plot, story and characters different than those used and written by Mark Twain, and publicize and advertise such property as a Mark Twain property, those motion

picture producers who are prospective purchasers of the Mark Twain properties still protected by copyright, would refuse to purchase or obtain licenses to make pictures based on Mark Twain properties that are still protected by copyright, and would follow the same plan that the defendant did in this case with respect to "Best Man Wins," with the result that the plaintiffs would be hampered, or even prevented in their sales of their literary property, to the great damage and monetary loss of plaintiffs.

The whole doctrine of unfair competition is of very recent origin as compared to the entire body of law. Daphne Robert points out in "The New Trade-Mark Manual," just published and relating to the newly passed Lanham Act, that Browne, in the first edition of his book on trademarks published in 1873, made no reference to the phrase "unfair competition" but had a heading entitled "Cases analogous to trade-mark cases," and that in the second edition of Browne's book published in 1885, the same chapter heading was used, but the phrase "unfair competition" appears in the text for the first time as a rough translation of the French "concurrence deloyal." As Robert says, "The French seemed to recognize the wrong before we did and had a name for it." He then goes on to say:

"But the phrase 'unfair competition' soon became applied exclusively to cases involving what the English call passing off. Passing off is the sale of one man's goods as another's without copying his trade-mark. The development of law was in danger of

being halted by this supposed limitation of the term unfair competition. Happily, unfair competition soon became applied to conduct which did not involve passing off. It was extended to include misappropriation of trade values as well as misrepresentation, and in general to acts which artificially and injuriously interfere with the normal course of trade." (Introduction to "The New Trade-Mark Manual," pages XIV and XV.)

Mr. Robert traces the historical development of trade-marks from earliest beginnings as being a mark appurtenant to physical premises, then through its expansion to the status of personal property, removable as such, then through the phase where it indicated origin, up to modern times when the origin became anonymous, and on to the very present when origin is no longer the important function of the mark. With respect to such modern application, Mr. Robert says:

"Perhaps one of the most important functions of the trade-mark in modern business is to create and perpetuate a mark through use of the mark in advertising. The advertising, of course, is directed toward the product, but the demand for the product is created through the advertising of the mark itself. The quality of competing goods is often the same. Yet the selection of competitive goods in the modern market-place is made through the medium of the trade-mark. The advertising and selling function of marks has today made them one of the most valuable of business assets. * * * We cannot overlook the value which lies in the fact that when the owner wants to extend his mark to new or allied products to be sold under the trade-mark, a market has already been created for him." (The New Trade-Mark Manual, pp. 5 and 6.)

Mr. Robert then proceeds to quote part of the opinion of Justice Frankfurter in the *Mishawaka Rubber* case, 316 U. S. 203, 205, in which the Justice said:

“The protection of trade-marks is the law’s recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising shortcut which induces a purchaser to select what he wants or what he had been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of this symbol he has created, the owner can obtain legal redress.” (The New Trade-Mark Manual, pp. 8 and 9.)

Rudolph Callmann, in his recent book “Unfair Competition and Trade-Marks,” makes pointed reference to the theory referred to in many modern cases under which protection is given to trademarks, the theory being usually called that of “dilution of value.” As Callmann says:

“The gravamen of the complaint in these cases is that the continued use of such similar marks must inevitably dilute the distinctiveness of the plaintiff’s. The injury differs materially from that arising out of confusion; in the event that the similarity between the marks in question provokes confusion, there is an immediate or imminent loss of sales, for the confu-

sion tends to divert potential customers from the plaintiff to the defendant. Confusion leads to immediate injury, while dilution is the infection, which, if allowed to spread, will inevitably destroy the advertising value of the mark. The uniqueness or singularity of the trade-mark will sometimes be more important to the success of an advertising campaign than the quality of the product with which it is connected. The selling power of the mark is realistically dependent upon its distinctiveness. * * *

“It should be recognized, therefore, that dilution gives rise to a cause of action and should not be relegated to the status of a test of infringement. The wrong involved is not one necessarily affecting a competitive relationship, but is one that does injury to the property right of a trade-mark.” (Unfair Competition in Trade-Marks, Vol. 2, p. 1335.)

It is upon such theory, undoubtedly, that the courts, without specifically saying so, have restrained the use of a title of a literary property as the title for a motion picture of content entirely dissimilar to that of the original property. In short, such a use would so dilute the distinctiveness of the title as to make it thereafter largely valueless. Callmann then goes on to point out that, under many of the late cases, confusion of business is no longer the test as to the right to restrain another from using one's trademark, inasmuch as relief has been given in such recent leading cases as *Vogue Company v. Thompson-Hudson Co.*, 300 Fed. 509, 12 F. 2d 991, 71 L. Ed. 850; *Wall v. Rolls-Royce*, 4 F. 2d 333; *Dunhill v. Dunhill*, 3 Fed. Supp. 487; *Tiffany & Co. v. Tiffany Productions*, 264 N. Y. Supp. 459, 260 N. Y. Supp. 821, 262 N. Y.

482; wherein the goods involved were entirely non-competing and unrelated. As he observes, in three of the cases the basis of relief was the attempt by defendant to trade and capitalize upon plaintiff's reputation and goodwill, and in the *Tiffany* case the court decided against the defendant on the theory that:

"The real injury was the gradual whittling away of the identity and hold upon the public mind of plaintiff's name."

Incidentally, in the *Tiffany* case, as Callmann also points out, the court quoted with approval from Schechter, "The Rational Basis of Trade-Mark Protection," 40 Harv. L. Rev. 812, the theory of that article being that "the preservation of the uniqueness of a trade-mark should constitute the *only* rational basis for its protection." (Unfair Competition in Trade-Marks, Vol. 2, pp. 1336 and 1337.) Callmann then goes on to say:

"It appears that the courts are influenced, consciously or otherwise, by the fact that the defendant is attempting to appropriate values which are properly the plaintiff's; that this invasion of the plaintiff's rights may prove disastrous, and that the plaintiff is deserving of relief. * * *

"The theory of dilution is sound. Where there is confusion, it is superfluous, but where there is none, it is the only rationale which will furnish a cause of action. The use of a mark similar to the plaintiff's constitutes a trespass upon his property rights in his mark, for it necessarily involves a gradual impairment of its selling power."

Current development, expansion and change in the theory of unfair competition is further exemplified in the case of *Elastic Stop-Nut Corp v. Greene*, 62 Fed. Supp. 363 (D. C., Ill.), wherein the Court stated that the former requirement under the case law of Illinois of evidence of actual "palming off" of goods of the accused as the goods of the accuser in order to prove a case of unfair competition is no longer the law, in view of the holding in the case of *Lady Esther, Ltd. v. Lady Esther Corset Shoppe*, 43 N. E. 2d 165. The Court stated:

"In view of the general broadening of the theory of unfair competition in this state following the weight of authority throughout the United States * * * it is sufficient to warrant injunctive relief if there is likelihood of confusion in the trade."

And required no actual showing of any such confusion. In the *Lady Esther* case, cited in the last decision, the Court cites with approval from Schecter's article in 38 Harv. L. Rev. 370, saying as to that article:

"In speaking of the necessity for actual competition in cases designated as 'unfair competition,' the author says:

"The truism that law is a developing science is nowhere more strikingly illustrated than in the law of unfair competition. * * *

"* * * the usual cases demanding relief under the law of unfair competition in the early days of equity's protection happened to be simple cases of one trader's passing off his own goods as those of his rival, so that "passing off" would explain practically all the decisions. * * *

“ ‘In the recent cases of *Vogue Co. v. Thompson-Hudson Co.*, 300 Fed. 509, the Sixth Circuit Court of Appeals squarely repudiated such a doctrine and allowed a fashion magazine an injunction against a hat manufacturer who sought to secure for himself the benefit of plaintiff’s goodwill and reputation in the field of fashion. It is impossible to find any element of competition between the parties, “but there is no fetish in the word competition. The invocation of equity rests more vitally upon the unfairness.” ’ ”

The Court in that case gives the following quotation from Derenberg on Trade-Mark Protection and Unfair Trade, wherein that author, in referring to the *Vogue* case, says:

“With this decision, the law of unfair competition was freed of one of its heaviest chains. Any attempt to capitalize on the goodwill or reputation of another is declared to be unfair trade and is therefore unlawful even in the absence of ‘passing off’ or ‘competition’ in the literal sense of the word.”

The modern theory that there need be no competition between the two businesses for which the same name is sought to be used and that one need not wait until an injury has occurred to seek relief is approved in the case of *Academy of Motion Picture Arts and Sciences v. Benson*, 15 Cal. 2d 685, wherein the well known Academy of Motion Picture Arts and Sciences, best known for its annual awards in the motion picture industry, sought injunctive relief against defendant, who was operating an actors’ school under the name “The Hollywood Motion Picture Academy.” In the lower court the defendant’s demurrer to the complaint was sustained without leave to amend and that decision was reversed by California Supreme Court, which, at page 689 of the opinion, cited

with approval from *Tiffany & Co. v. Tiffany Productions* (*supra*), and *Yale Electric Corp. v. Robertson* (C. C. A.), 22 F. 2d 972, 974, and the Court further pointed out that though the facts of the case might be novel, it did not follow that plaintiff would not be entitled to relief, further saying:

“There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem.”

The appropriateness of the last cited language to the instant case needs no comment.

The case of *Uproar v. National Broadcasting Co.*, 8 Fed. Supp. 358, affirmed 81 F. 2d 373, is of the utmost significance. The facts were these: Ed Wynn, while under contract to Texaco for a series of radio programs in which he was to personally appear and for which he was to write the scripts, prepared a number of such scripts and made use of them on the programs which were broadcast through the affiliated stations of the National Broadcasting Company. Thereafter, through certain business associates—plaintiffs in this matter—he had such scripts published in pamphlet form under the name “Uproars” and had the pamphlets advertised over the radio. Graham McNamee, the well known radio announcer, also took part in the programs and his name was, of course, mentioned in the pamphlets. He was under contract with the National Broadcasting Company, which granted to them the right to the exclusive management of his services, trade name or names and productions for all purposes of whatsoever kind and nature, and the further right to use

his name and photograph in connection with advertising and publicity campaigns and for commercial purposes of any nature. The defendant Texaco Company objected to the publication of the pamphlets, and particularly to the advertising thereof over the air, and the defendant National Broadcasting Company objected to the mention and use of McNamee's name, and this action was brought by Wynn's business associates seeking damages at common law and under the anti-trust laws for what it considered unlawful interference with their business by the two defendants. The defendants in turn asked for affirmative relief by way of injunction. With respect to the use of McNamee's name, the District Court said:

“As to the defense of the National Broadcasting Company, the contract between it and Grahm McNamee purported to confer upon the company the sole and the exclusive right to the services of McNamee in connection with broadcasting, and also the right to use his name for commercial purposes, whether connected with broadcasting or otherwise. The name has acquired, through the efforts of McNamee and the National Broadcasting Company, a very substantial value, especially valuable for advertising purposes; and this definite commercial value exists apart from the services as radio announcer. Rights of a pecuniary nature have been created which partake of the elements of property rights, and which will receive the protection of equity. *International News Service v. Associated Press*, 248 U. S. 215, 39 S. Ct. 68, 72, 63 L. Ed. 211, 2 A. L. R. 293. These rights may properly be the subject-matter of a transfer from McNamee to the broadcasting company. *Petrolia Mfg. Co. v. Bell & Bogart Soap Co. (C. C.)*, 97 F. 781; *The Coca-Cola Bottling Co. v. The Coca-Cola Co. (D. C.)*, 269 F. 796; *Brown Chemical Co. v.*

Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. Ed. 247; Richmond Nervine Co. v. Richmond, 159 U. S. 293, 16 S. Ct. 30, 40 L. Ed 155.”

The Court then went on to say:

“Both defendants complain that the plaintiff, in publishing ‘Uproars,’ has appropriated and will appropriate the good will which the defendants have, at large expense, succeeded in creating, and to which the plaintiff has contributed nothing. In other words, that the plaintiff, for his own profit is seeking to take an unfair advantage of the popularity of widely advertised programs, the propriety interests in which belong exclusively to the defendants under their respective contracts with Wynn and McNamee.

“This misappropriation and the use by the plaintiff tends to impair the value of the exclusive rights which the defendants have acquired by cheapening the whole advertising program. * * *

“While plaintiff’s undertaking is not, strictly speaking, unfair competition in the sense that the plaintiff is attempting to palm off his goods for the goods of a competitor, it comes within the rule which the courts have frequently applied in cases of unfair business practices regardless of the element of competition. Aluminum Cooking Utensil Co. v. Sargoy Bros. & Co. (D. C.), 276 F. 447; Aunt Jemima Mills Co. v. Rigney & Co. (C. C. A.), 247 F. 407, L. R. A. 1918C, 1039; Akron-Overland Tire Co. v. Willys-Overland Co. (D. C.), 273 F. 674; International News Service v. Associated Press; Feldman v. Amos and Andy (Cust. & Pat. App.) 68 F. 2d 746.

“In International News Service v. Associated Press, the court observed: ‘Stripped of all disguises, the process amounts to an unauthorized interference

with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not. * * * The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business. * * * In a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience.'

"While the plaintiff is not a competitor of either of the defendants, logically the same rule would apply to one misappropriating to his own profit, and to the disadvantage of the other, rights which the latter has acquired fairly and at substantial costs."

The Court then proceeded to perpetually enjoin the plaintiff from prosecuting the action of law, from publishing, advertising, selling, or distributing the pamphlets and from making any commercial use of the name "Graham McNamee" "so long as his contract with the National Broadcasting Company, or any extension or renewal thereof, is in force." In affirming the case, the Circuit Court held that though the property in the scripts remained in Wynn it was subject to the restriction that he would not make any use of them which would weaken or interfere with the use for which they, so to speak, had

been sold, to wit, the purpose of attracting people to listen in to the Texaco Company's advertising. This indicates most clearly how in this day and age such a literary property as a script has a distinct value as an advertising attraction, separate and apart from the literary property rights in the script as such. The Circuit Court repeats verbatim the quotation above set forth with respect to the fact that the plaintiff, for its own profit, was seeking to take advantage of the popularity of the widely advertised programs. Finally, the Circuit Court, in affirming the decision, said on the question of the appropriation of McNamee's name, "It is clear that plaintiff had no right to use Graham McNamee's name in its publication."

Thus it is to be seen that the courts not only will give, but have given, under appropriate circumstances and facts, full protection to advertising values, as distinguished from literary values, though both arise out of the same literary property, and also it is to be seen that the courts recognize, under appropriate circumstances, the right of a man to grant to another the exclusive use of his name and will restrain third parties from interfering with the rights so granted.

It seems most obvious that, inasmuch as the courts are now according full protection to trademarks and trade names as against entirely noncompetitive lines, on the theory that the defendants are diluting the value or interfering with the normal trade expansion possibilities of that mark in fields into which it had never before extended, that the courts have definitely accorded to the mark, as such, a distinct property value, based upon the time, effort and moneys expended in acquainting the public with that mark and giving it its drawing power. It was that very drawing power that defendant undoubtedly was

desirous of obtaining in the instant case. It must further be obvious that since such noncompetitive use will be fully restrained under modern-day developments of the law of unfair competition, in actuality the courts are declaring in effect that there is a fully developed property right in a trademark and that, as with any other property, an encroachment upon it (defining such an encroachment in the light of modern business and advertising practices) would constitute a trespass.

Counsel for plaintiffs contends that plaintiffs have the exclusive right to the trademark or trade name of "Mark Twain" with the only exception that the trade name or trademark of "Mark Twain" may be used by others in connection with such of the literary works of Mark Twain or Samuel L. Clemens, deceased, that are now in the public domain. Plaintiffs respectfully submit that this is an analogous situation where one has exclusive right to a trademark or tradename, but licenses a third party to use this trademark or trade name for some specific purpose. Except for the license so granted by the owner of the trademark or trade name, the owner still retains the exclusive right and is entitled to all the protection the law gives the owner of a trademark or trade name. The right to use the trademark or trade name "Mark Twain" in connection with literary property of Samuel L. Clemens in the public domain is merely a license for such use, the only difference being that the exclusive owner of the trademark did not give or grant such license, but this license is permitted by operation of law.

Clemens v. Belford, 14 Fed. 728.

Counsel for plaintiff respectfully submits to the Court that plaintiffs have a definite ownership and property right in the trademark "Mark Twain" aside from the

rights in and to the literary property or literary material itself. That they have expended time, effort, and money in developing, advertising and exploiting the trademark "Mark Twain" in connection with the literary property or literary material they own. That defendant Columbia Pictures Corporation has misappropriated this trademark for its own use and benefit, and for its own profit in connection with a motion picture which it has produced, and has, and still is distributing throughout the United States, and which motion picture photoplay is based on literary works or literary material entirely dissimilar and bears no relationship or connection to any literary works or literary material written by Mark Twain, whether in the public domain or otherwise.

Counsel for plaintiffs respectfully submits to the Court, in view of the foregoing, and in view of the authorities herein cited, defendant's Motion to Dismiss should have been denied, and the lower court's ruling should be reversed.

Respectfully submitted,

HARRY E. SOKOLOV,

Attorney for Plaintiffs.

No. 12554.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS G. CHAMBERLAIN and CENTRAL HANOVER BANK
& TRUST COMPANY, as Successor Trustees under the
Last Will and Testament of SAMUEL L. CLEMENS,
deceased, MARK TWAIN COMPANY and CLARA CLEMENS
SAMOSSOUD,

Appellants,

vs.

COLUMBIA PICTURES CORPORATION,

Appellee.

APPELLEE'S BRIEF.

MITCHELL, SILBERBERG & KNUPP and
LEONARD A. KAUFMAN,

603 Roosevelt Building, Los Angeles 17,
*Attorneys for Defendant, Columbia Pictures
Corporation.*

FILED

406 24 1950

TOPICAL INDEX.

PAGE

- A. The amended complaint fails to state a claim for infringement of trade-mark because plaintiffs' alleged mark is merely descriptive as applied to literary property..... 1
- B. The amended complaint fails to state a claim based on unfair competition 12

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Ambassador Hotel Corp. v. Hotel Sherman Co., 226 Ill. App. 247	27
American Steel Foundries v. Robertson, 269 U. S. 372, 70 L. Ed. 317	4, 14, 29
American Washboard v. Saginaw Mfg. Co., 103 Fed. 281.....	15, 19, 20
Armstrong Cork Co. v. Ringwalt Linoleum Works, 235 Fed. 458	17
Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 83 L. Ed. 195.....	2
Atlas v. Street & Smith, 204 Fed. 398.....	4
Borden's Condensed Milk Co. v. Horlick's Malted Milk Co., 206 Fed. 949.....	16
California Apparel Creators v. Wieder of California, 162 F. 2d 893	19, 21
Clemens v. Belford, Clark & Co., 14 Fed. 728.....	7
Font & Co. v. Lopez Bros., 36 Puerto Rico Reports 233.....	28
Jackson v. Universal International Pictures, 95 A. C. A. 99....	30
Krauss v. Jos. R. Peebles, Sons Co., 58 Fed. 585.....	27
Lacroix v. Nodal, 6 So. 795.....	28
Mosler Safe Co. v. Ely-Norris Safe Co., 273 U. S. 132, 71 L. Ed. 578	19, 20
Palmer v. Gulf Pub. Co., 79 Fed. Supp. 731.....	32
Richards & Company v. Butchee, 62 L. T. Reps. 867.....	28
Roberson v. Rochester Folding Box Company, 171 N. Y. 538, 59 L. R. A. 478.....	33
Societe des Hueles D'Olive de Nice v. Rorke, 39 N. Y. Supp. 28	28

	PAGE
Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 55 L. Ed. 536.....	5, 7
Sunbeam Lighting Co. v. Sunbeam Corporation (C. C. A. 9, Case No. 12357, decided June 30, 1950).....	4
Warner Bros. v. Majestic Pictures Corporation, 70 F. 2d 310....	30

STATUTES

Federal Trade Commission Act, Sec. 5.....	21
Trade-mark Act, Sec. 1	4, 7
Trade-mark Act, Sec. 2	3
15 United States Code Annotated, Sec. 1051.....	4, 7
15 United States Code Annotated, Sec. 1052.....	3
15 United States Code Annotated, Sec. 1127.....	5
15 United States Code Annotated, Sec. 1052(e) (1), (3).....	2

TEXTBOOKS

52 American Jurisprudence, p. 536.....	5
52 American Jurisprudence, p. 537.....	5, 7
Restatement of Law of Torts, Secs. 715, 716, 717, 721, 722.....	2

No. 12554.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS G. CHAMBERLAIN and CENTRAL HANOVER BANK
& TRUST COMPANY, as Successor Trustees under the
Last Will and Testament of SAMUEL L. CLEMENS,
deceased, MARK TWAIN COMPANY and CLARA CLEMENS
SAMOSSOUD,

Appellants,

vs.

COLUMBIA PICTURES CORPORATION,

Appellee.

APPELLEE'S BRIEF.

A. The Amended Complaint Fails to State a Claim
for Infringement of Trade-mark Because Plain-
tiffs' Alleged Mark Is Merely Descriptive as
Applied to Literary Property.

Plaintiffs contend that their trade-mark has been in-
fringed by defendant's use of the name, Mark Twain, to
describe the source of the story of its motion picture.
Whatever may be plaintiffs' rights with respect to the
use of the name as applied to such commercial goods as
bicycles, hats, or pipe organs, they have no right to the
exclusive use of the author's name *in connection with lit-
erary or dramatic properties*. The right to such exclusive
use in connection with literary or dramatic properties is

prerequisite to the protection of the alleged trade-mark in this case, and plaintiffs can have no such exclusive right because the name, Mark Twain, is “descriptive” and also “primarily a surname” when used in connection with such properties.

15 U. S. C. A., Sec. 1052(e)(1), (3);

Restatement of Torts, Secs. 715, 716, 717, 721, 722.

A trade-mark may be non-descriptive with reference to one product and descriptive with reference to another. The mark upon which a plaintiff relies in an action based on trade-mark must be non-descriptive *as applied to defendant's product*. In this case that product is a literary work.

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 83 L. Ed. 195.

In the *Armstrong* case the complaint alleged that plaintiff had registered the word “Nu-Enamel” for “mixed paints, varnishes, paint enamels, prepared shellac, stains, lacquers, etc.” The Court held:

(a) The Federal Trade-mark Act does not create any substantive rights in the registrant, but merely provides procedural remedies.

(b) Registration under the Act may be attacked collaterally.

(c) “Nu-Enamel” is descriptive and the trade-mark is invalid.

“The trade-mark is registered by the Nu-Enamel Corporation for a variety of products from enamels through paint brushes to glue, solder and tack rags.

It is quite true that the mark is not descriptive as applied to many of respondent's products, but the use by petitioner, the Armstrong Company, of which the Nu-Enamel Corporation complains, is the use of 'Nu-Enamel' or 'Nu-Beauty Enamel.' This use, Armstrong answers, and the evidence supports the assertion, is confined to the enamels. *We must, therefore, consider the case as though the only products of Nu-Enamel Corporation were enamels. As applied to them, it is descriptive.*" (P. 203; emphasis added.)

Similarly, defendant Columbia Pictures' use of the name, Mark Twain, is confined to literary works and this Court must consider the question of descriptiveness or non-descriptiveness solely with respect to literary properties.

"Mark Twain" comes within the exception of Section 2 of the Trade-mark Act (15 U. S. C. A., Sec. 1052) which provides that:

"No trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration . . . on account of its nature unless it—(e) consists of a mark which, (1) *when applied to the goods of the applicant* is merely descriptive . . . of them, or . . . (3) is primarily a surname." (Emphasis added.)

(That a trade-mark may be protected in connection with its use on one article and not on another has clearly been established.

"The mere fact that one person has adopted and used a trade-mark on his goods does not prevent the

adoption and use of the same trade-mark by others on articles of a different description.”

American Steel Foundries v. Robertson, 269 U. S. 372, 381, 70 L. Ed. 317, 320;

Sunbeam Lighting Co. v. Sunbeam Corporation, C. C. A. 9, Case No. 12357, decided June 30, 1950;

Atlas v. Street & Smith, 204 Fed. 398.

This principle is recognized in Section 1 of the Trade-mark Act itself (15 U. S. C. A., Sec. 1051) which requires the applicant for registration to specify “the goods with which the mark is used and the mode and manner in which the mark is used in connection with such goods”).

The entire following discussion, therefore, is intended to refer to plaintiffs’ right to the exclusive use of the name, Mark Twain, in connection with literary property.

A mark or name is either descriptive of the product—that is, refers to a characteristic of the product—or it points to the origin of the product—that is, indicates its ownership or production by plaintiffs. It is submitted that the name, Mark Twain, is descriptive and does not refer to origin. It describes a characteristic of a literary work, namely, that it was written by Mark Twain. *It does not refer to plaintiffs in any way*, and reference to plaintiffs is the only function of a trade-mark. To be a valid trade-mark, the name, Mark Twain, would have to signify origin from a single, though perhaps anonymous, source (i.e., plaintiffs); the name signifies no such thing. It signifies the author.

Moreover, defendant made it abundantly clear in its advertising that “Mark Twain” was intended as a descrip-

tion of its motion picture. Defendant did not use the name by itself but as part of such phrases as "Based on the Mark Twain story . . ." or "A story only Mark Twain could tell." [R. 8-9.]

The Trade-mark Act defines a "trade-mark" as "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify *his* goods and distinguish them *from those manufactured or sold by others.*" (15 U. S. C. A., Sec. 1127; emphasis added.)

A trade-mark is a mark "which serves the purpose of distinguishing the goods of a *particular producer or dealer* and which . . . is of such a nature as to be susceptible of *exclusive appropriation by one person.*"

52 Am. Jur. 536-7 (emphasis added; citing *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, 55 L. Ed. 536, and many other decisions of the U. S. Supreme Court and other courts).

A trade-mark gives its owner the *exclusive* right to use it. *If* plaintiffs, here, have a valid trade-mark in the name, Mark Twain, they have the right to prevent *anyone* from using that name. Plaintiffs cannot successfully argue that, by virtue of their alleged trade-mark, they have the right to prevent *some* persons (such as defendant) from using the name, but not others. Whatever may be plaintiffs' rights to prevent defendant and some others from using the name in a particular manner on the theory of *unfair competition*, on the theory of *trade-mark* plaintiffs have the right to enjoin all users or none. *Plaintiffs either have a valid trade-mark or they don't have one.*

It is apparent from the face of the amended complaint that plaintiffs do not have a valid trade-mark. Plaintiffs allege that they own *some* of Mark Twain's works. Some others are in the public domain, free to be used by anyone. (THE JUMPING FROG is in this group.) If TOM SAWYER and HUCKLEBERRY FINN are in the public domain, can plaintiffs enjoin anyone who publishes these stories from representing that they were written by Mark Twain? Obviously not. Yet if plaintiffs' alleged trade-mark in the name, Mark Twain, were valid, they could do so, since the right in a trade-mark is an *exclusive* right. The legality of the use of another's trade-mark does not depend upon the nature of that use.

As stated in the above quotations, a trade-mark is a device used by a merchant to designate *his* goods—and his goods exclusively; the mark distinguishes the goods of *that* "particular producer or dealer." *A trade-mark refers to the merchant who owns it.* When defendant, here, advertised its picture as based on a Mark Twain story, no one could possibly construe this as a reference to *plaintiffs*; that is, the name, Mark Twain, does not identify plaintiffs' goods or "distinguish them from those manufactured or sold by others." Plaintiffs own only a portion of the Mark Twain stories.

"No one can claim protection for the exclusive use of a trade-mark or trade-name which would give him a monopoly in the sale of any goods other than those produced by himself. Accordingly, no sign or form of words can be appropriated as a valid trade-mark

which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose."

52 Am. Jur. 537 (emphasis added; citing *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, 55 L. Ed. 536, and other decisions of the U. S. Supreme Court).

The "primary meaning" of "Mark Twain" is the author, Samuel Clemens—not the Hanover Bank & Trust Company, *et al.*, plaintiffs here. Since "others may employ with equal truth and with equal right for the same purpose," the name, Mark Twain, plaintiffs are not entitled to protection.

The requirement of a valid trade-mark here discussed is embodied in Section 1 of the Trade-mark Act (15 U. S. C. A., Sec. 1051) which provides that before the owner of a trade-mark may register it, he must file in the Patent Office a verified application to the effect that he believes that "no other person . . . has the right to use the mark." Plaintiffs clearly could not, truthfully, make such statement, because anyone who publishes a Mark Twain story may use the name, Mark Twain.

Samuel Clemens (Mark Twain) himself, the author of *THE JUMPING FROG*, once brought an action in a Federal court which, it is urged, clearly demonstrates that the pseudonym, Mark Twain, is not a proper subject of trade-mark protection in connection with literary property.

Clemens v. Belford, Clark & Co., 14 Fed. 728.

"The bill in this case states that complainant has, for about 20 years last past, been an author and writer by profession; that he has been in the habit

for said time of publishing articles, sketches, books, and other literary matter, composed by him for publication under the name, assumed by him to designate himself as the author and writer of such sketches, articles, books and other literary matter, of 'Mark Twain'; that the said designation of 'Mark Twain' has been used by him during the last 20 years as his *nom de plume* or trade-mark as an author; that his said writings, under the designation of 'Mark Twain,' have acquired great popularity, and met with a ready and continuous sale, and that no other person has been licensed or permitted by him to use said designation of 'Mark Twain' as a *nom de plume* or designation of authorship; . . .” (P. 729.)

Defendant publishing firm, without permission from Twain, who was then alive, compiled a number of his stories and sketches in a volume entitled “Sketches of Mark Twain.” All of these sketches were in the public domain, one of them being the “Jumping Frog Restored to the English Tongue after Martyrdom in the French.” Twain, claiming that he had a trade-mark in his *nom de plume*, sought an injunction and damages. The Court dismissed the complaint, writing:

“Trade-marks are the means by which the manufacturers of vendible merchandise designate or state to the public the quality of such goods, and the fact that they are the manufacturers of them; and one person may have several trade-marks, designating different kinds of goods or different qualities of the same kind; but an author cannot, by adoption of a NOM DE PLUME, be allowed to defeat the well-settled rules of the common law in force in this country, that the ‘publication of a literary work without copy-

right is a dedication to the public, after which any-one may republish it.' . . . any person who chooses to do so, can republish any uncopyrighted literary production, and give the name of the author, either upon the title-page, or otherwise, as best suits the interest or taste of the person so republishing." (Pp. 731-2; emphasis added.)

Plaintiffs seek (Op. Br. 14-15) to distinguish the *Clemens* case on the ground that they "seek to protect their property right of trade-mark 'Mark Twain,' which trade-mark is used to designate the origin and ownership of their literary works, which property right has no relationship or bearing to the literary content or literary material." Samuel Clemens, too, like plaintiffs here, sought to protect his alleged trade-mark in his *nom de plume*, Mark Twain. Clemens alleged that, by defendant's acts he had "been greatly injured, and his property in the said *nom de plume* or trade-mark of 'Mark Twain' as a commercial designation of authorship has been deteriorated and lessened in value" and sought damages and an injunction.

The name, Mark Twain, does *not* designate the "origin and ownership" of their literary works as plaintiffs state that it does. It designates the author, not the owner. The thoughts of a prospective theatre patron, viewing defendant's advertising that "Best Man Wins" is based on Mark Twain's story, "The Celebrated Jumping Frog of Calaveras County," would be directed to the famous author and could in no sense suggest the present owner of "The Jumping Frog," let alone the owners of other Mark Twain stories not even referred to in the advertising.

Plaintiffs devote pages of their opening brief to criticism of defendant's contention that the name, Mark Twain, is merely descriptive. It is submitted that plaintiffs' discussion in fact *aids* defendant. Plaintiffs state or quote the following:

"The former Trade-mark Act precluded registration of marks or words which were clearly descriptive." (P. 11.)

As shown above, the present Trade-mark Act has a similar provision.

"To justify finding that words are merely descriptive and that registration of trade-mark is invalid, it must be shown that they apply especially to some ingredient, quality or characteristic of the products to which they are applied." (P. 12.)

As already shown, the name, Mark Twain, *does* show a characteristic of a literary work: its authorship.

"The question of the descriptiveness of a mark must be considered in the light of its significance to the purchaser." (P. 12.)

The name, Mark Twain, to a purchaser, means that the literary work was written by Mark Twain, not that it is owned by plaintiffs. It does not refer to ownership.

"A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article, to which it is applied." (P. 12.)

The name, Mark Twain, does not point to the origin or the ownership in plaintiffs in any one of the literary works to which it is applied.

"Former Section 85 of this title did not exclude from registration a descriptive mark if applicant had

the right to use the mark involved and no one else had the right to such use in identical form or in such near resemblance as might be calculated to deceive.” (P. 14.)

It is not true in the case at bar that “no one else had the right to such use in identical form”; anyone who published a Mark Twain story had the right to use the name, Mark Twain.

Plaintiffs quote at length from Daphne Robert. (Op. Br. 10-11.) Miss Robert expressly states in the quoted portion of her commentary that descriptive words were *and are* denied registration. She then writes:

“However, if, through substantially exclusive and continuous use, the mark becomes distinctive and indicates in the market place *only the goods or services of the user*, it may be registered . . .” (Emphasis added.)

The “user,” in the case at bar, is plaintiffs. The name, Mark Twain, does not indicate the goods or services of plaintiffs at all, but only a characteristic of the work to which it is connected.

Plaintiffs themselves emphasize this fact when they quote (Op. Br. 11) from their amended complaint in which they allege that “Mark Twain . . . indicates in the literary market throughout the world only the literary works and writings of Samuel L. Clemens, deceased.”

B. The Amended Complaint Fails to State a Claim Based on Unfair Competition.

The nub of plaintiffs' claim is set out in paragraphs XX and XXII of the amended complaint. [R. 9-11.] Plaintiffs allege that the uncopyrighted Mark Twain story, "The Celebrated Jumping Frog of Calaveras County" (in which they have no interest whatsoever), (1) concerns Jim Smiley, the central character, (2) who would bet on anything, (3) who owns a pumping frog, (4) named "Dan'l Webster," and (5) who loses a bet because his frog gets filled with buckshot. The central character of defendant's motion picture also is Jim Smiley, the gambler, who owns a jumping frog named "Dan'l Webster"; however, the "buckshot" incident is "different" from that in the Mark Twain story, and the short story is expanded into a full length motion picture.

The amended complaint alleges that defendant advertised its picture as "Based on the Mark Twain story, 'The Celebrated Jumping Frog of Calaveras County,'" or as "One of Mark Twain's favorite stories." [Paragraph XVIII, R. 8.] During the hearing before the trial court of defendant's motion to dismiss the amended complaint, *plaintiffs conceded that they stated no cause of action based on defendant's advertising its picture as "based on" a Mark Twain story* [R. 35, 37], *that even if defendant's picture is a poor one it would not "dim Mark Twain's fame or his claim to mention in literary fame"* [R. 37], *and that they have stated no cause of action based on "moral rights of authors,"* because that right was one personal to Mark Twain and died with him. [R. 38.]

Plaintiffs' case narrows down, then, to the fact that defendant caused to be inserted in some advertisements in

newspapers, such phrases as "Mark Twain's tale of a gamble in hearts!," "Mark Twain's Favorite Story," "Mark Twain's Lovable Rogue, who would a-wandering and a-wooing go," and "A Story only Mark Twain Could Tell." [R. 9.]

The amended complaint does *not* allege, as plaintiffs state (Op. Br. 15) that "the Mark Twain Estate is receiving considerable income . . . particularly by the licensing of motion picture rights" in the copyrighted Mark Twain stories which they own to producers of motion picture photoplays. In any event, their contention is that if they have no remedy in this Court, prospective purchasers would, like defendant, produce motion pictures based on Mark Twain works which are in the public domain (or of which plaintiffs do not own the copyright), and use similar advertising slogans which, plaintiffs say, might be construed by theatre patrons as indicating not only that the pictures were *based on* the stories but that they were *exact* picturizations of those stories.

In the first place, no reasonable trier of fact could find that a prospective theatre-goer would reasonably be misled by the advertising slogans of which plaintiffs complain. It is obviously impossible to produce a full length motion picture of a short story of a few pages—dealing with a *single* incident [R. 9]—without expanding it and adding sequences to the original. Furthermore, it is common knowledge that, in adapting any literary work to a different medium (motion pictures), it is necessary that some changes be made and it is invariable that some changes are made. Indeed, unlike the present case, the original name of the story is usually retained for the motion picture. It is clear, as a matter of law, from the analyses of

the story and picture set out by plaintiffs themselves, that defendant is guilty of no deception in connection with this "very popular" [R. 7] short story.

Assuming, however, that defendant's slogans did not accurately represent the relationship between motion picture and story, still *plaintiffs* have no cause of action. Defendant neither "passed off" nor "misappropriated" so as to be guilty of unfair competition:

The general purpose of the law of unfair competition "is to prevent one person from passing off his goods or his business as the goods or business of another." (*American Steel Foundries v. Robertson*, 269 U. S. 372, 381, 70 L. Ed. 317, 320.) The brief and conclusive answer to any contention on the part of plaintiffs based on this doctrine is that *defendant's advertisement* (that BEST MAN WINS is a completely exact picturization of THE JUMPING FROG) *cannot possibly lead anyone to believe that BEST MAN WINS is "the goods or business" of PLAINTIFFS or that PLAINTIFFS made the picture or own the story or that PLAINTIFFS are in any way connected with the picture or story.*

If defendant is guilty of any misrepresentation, it is not directed to plaintiffs. Furthermore, there is no allegation of secondary meaning referring to these plaintiffs.

Moreover, *defendant has appropriated nothing from plaintiffs. It has not copied nor used in any manner any literary property, copyrighted or not, in which plaintiffs have an interest, nor used any trade-mark or name to which plaintiffs have an exclusive right.*

A well known line of cases definitely disposes of any possible contention that plaintiffs have a cause of action

based on unfair competition. They specifically hold that *even though a defendant may be guilty of misrepresenting his own product to the public, his competitor has no private cause of action against him* (unless that defendant is attempting to pass off his own goods as that of plaintiffs), and it should be noted that *in the case at bar the parties are not even competitive*, so that the possibility of injury to plaintiffs is far more remote than in the following cases.

In *American Washboard v. Saginaw Mfg. Co.*, 103 Fed. 281, plaintiffs attempted to set out a case of unfair competition, but it was held that a demurrer to the complaint had been properly sustained. Plaintiff was engaged in the manufacture and sale of washboards which enjoyed a high reputation and which had been sold in large quantities. The rubbing face of the boards were made of aluminum and were marked with the word "aluminum." Plaintiff had a monopoly of aluminum and was the only manufacturer making boards using this material. Plaintiff had advertised extensively.

Defendant, knowing the above, branded its washboard "aluminum" and advertised them as aluminum; defendant's boards were in fact made of zinc and contained no aluminum.

The Court wrote that the complaint:

"undertakes to make a case, not because the defendant is selling its goods as and for the goods of complainant, but because it is the manufacturer of a genuine aluminum board, and the defendant is deceiving the public by selling to it a board not made of aluminum, although falsely branded as such, being in fact a board made of zinc material; that is to say,

the theory of the case seems to be that complainant, manufacturing a genuine aluminum board, has a right to enjoin others from branding any board 'Aluminum' not so in fact, although there is no attempt on the part of such wrongdoer to impose upon the public the belief that the goods thus manufactured are the goods of complainant. We are not referred to any case going to the length required to support such a bill. It loses sight of the thoroughly established principle that the private right of action in such cases is not based upon fraud or imposition upon the public, but is maintained solely for the protection of the property rights of complainant. It is true that in these cases it is an important factor that the public are deceived, but it is only where this deception induces the public to buy the goods as those of complainant that a private right of action arises." (Pp. 284-5.)

"If the doctrine contended for by complainant in this case was to be carried to its legitimate results, we should, as suggested by Mr. Justice Bradley in the case of *New York & R. Cement Co. v. Coplay Cement Co.*, (C. C.) 44 Fed. 277, open a Pandora's box of litigation. A person who undertook to manufacture a genuine article could suppress the business of all untruthful dealers, although they were in no wise undertaking to pirate his trade." (P. 285.)

In *Borden's Condensed Milk Co. v. Horlick's Malted Milk Co.*, 206 Fed. 949, the complaint alleged that defendant's advertising misrepresented defendant's product and in dismissing the complaint the Court wrote as follows:

"As indicated, there is nothing to show that complainant had any peculiar right, power or property in respect of the manufacture of malted milk, which was either susceptible of being, or had in fact been,

exclusively appropriated by it in such manufacture; and the case narrows down to this: Can it prevent the defendants from claiming for or ascribing to themselves or their product 'qualities, titles, or rewards' which they may not actually possess or be entitled to? Take an analogous case: Rival shopkeepers are engaged in selling a fabric which may be of foreign or domestic manufacture. The foreign fabric is concededly of better quality, and consequently in greater favor. One dealer sells only the foreign, the other only the domestic, fabric. Suppose the latter advertises or proclaims the article sold by him to be of foreign manufacture, and that his establishment is the only one so dealing in such fabric of 'genuine foreign' manufacture; has he invaded or taken from his rival's property rights? It would seem not. His act consists in an attempt to deceive the public, and, while his rival may be injured, he is not deprived of any personal legal right. Both are in the competitive field, and, while each may guard his own rights against invasion by the other, neither can, by injunction, exercise a censorship or guardianship over the commercial morals of the other in respect of appeals to the public, which are not based upon a deprivation of something legally belonging to the one claiming injury." (Pp. 952-3.)

In *Armstrong Cork Co. v. Ringwalt Linoleum Works*, 235 Fed. 458, plaintiffs were three linoleum manufacturers who produced 54 per cent of the product in the United States. They charged defendant with unfair com-

petition on the ground that defendant made a cheap and inferior product which was not linoleum but which defendant advertised as such. The Court wrote:

“The gravamen of the charge is that the defendant is making and vending a spurious article, and deceiving the public into buying it as genuine, with the result that the genuine article is discredited in reputation, and that the plaintiffs, who make and sell only the genuine article, are damaged. Such damages, however, are not the result of any attacks upon the property rights of the plaintiffs, and a right of action of the kind here pressed lies only when a property right has been invaded. *Canal Company v. Clark*, 13 Wall. (80 U. S.) 311, 20 L. Ed. 581; *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 604, 9 Sup. Ct. 166, 32 L. Ed. 535; *Brown Chemical Co. v. Meyer*, 139 U. S. 544, 11 Sup. Ct. 625, 35 L. Ed. 247; *Elgin National Watch Co. v. Ill. Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; and *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609. At the close of the argument on such motion, the court so expressed itself.” (P. 460.)

“A discussion of the cases cited by plaintiffs’ counsel as holding a different view—to my mind distinguishable from the instant case—would be profitless, as the case of *American Washboard Co. v. Saginaw Mfg. Co.*, *supra*, in my judgment, furnishes the law controlling the case at bar.” (P. 460.)

“That case has been frequently cited with approval. See *Daviess County Distilling Co. v. Martinoni* (C. C.) 117 Fed. 186; *American Wine Co. v. Kohlman* (C. C.) 158 Fed. 830; *Lowe Bros. Co. v. Toledo Varnish Co.*, 168 Fed. 627, 94 C. C. A.

83; *Rathbone, Sard & Co. v. Champion Steel Range Co.*, 189 Fed. 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258; *Edward Hilker Mop Co. v. United States Mop Co.*, 191 Fed. 613, 112 C. C. A. 176; *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, 121 C. C. A. 200; *Borden's Condensed Milk Co. v. Horlick's Malted Milk Co.* (C. C.) 206 Fed. 949.

"The bill is dismissed, with costs." (P. 461.)

In *Mosler Safe Co. v. Ely-Norris Safe Co.*, 273 U. S. 132, 71 L. Ed. 578, the Supreme Court followed the principle of the *American Washboard Co.* case, when it did not affirmatively appear that plaintiff had a monopoly in his product. (The Court expressly stated that it was not ruling on the question of plaintiff's rights if it in fact did have a monopoly.) Defendant treats this case only briefly at this point because it is referred to in the opinion of the *California Apparel* case which defendant hereafter sets out at some length because it is a recent, clear and cogent expression of the law as it stands today.

It should be noticed that plaintiffs, in the case at bar, do not have a monopoly; they own only a portion of the extant works by Mark Twain, and thus come squarely within the Supreme Court holding in the *Mosler Safe Co.* case, as well as the others in the above mentioned line of cases.

Indeed, plaintiffs' position is much more difficult than was that of the plaintiffs in the above cases. Plaintiffs do not—and cannot—contend that defendant lured plaintiffs' customers away by misleading advertising. The parties are not competitive. Plaintiffs here contend that defendant is setting a bad example. (Op. Br. 16.)

If plaintiffs' theory is sound, then any person in any business can recover against any other person who makes any misrepresentation in his advertising. It would make no difference whether the parties were in the same business or whether one sold hats and the other blast furnaces: the complainant could always claim that if the defendant "gets away" with the practice, someone else, in the same business as complainant, could make misrepresentations and get away with it and thus injure him. That is, plaintiffs Chamberlain, et al., here, do not claim that Columbia Pictures is directly persuading plaintiffs' potential customers to deal with Columbia instead of plaintiffs (as was the claim in the American Washboard and Mosler Safe Co. cases); plaintiffs argue that if Columbia can misadvertise its pictures, others can do so too. In other words, plaintiffs contend that unless this Court rules in their favor a principle will be established which will permit false advertising. But no different principle would be established if Columbia, instead of producing and advertising a motion picture as "Mark Twain's," had manufactured and advertised zinc washboards and advertised them as aluminum. Plaintiffs' argument would be equally applicable: if Columbia can misrepresent their washboards, then Paramount Pictures can misrepresent their motion pictures and, therefore, Paramount would not buy plaintiffs' copyrighted Mark Twain stories because it could write its own story based on one of Twain's which was in the public domain, distort and add to it, and advertise it as "one of Mark Twain's stories."

It is hoped that this illustrates that plaintiffs must have an exclusive right and they must be injured directly by defendant's acts. Under plaintiffs' argument, the fact that Columbia's alleged misrepresentation referred to

Mark Twain is irrelevant. Any misrepresentation whatsoever would serve plaintiffs' argument just as well.

Plaintiffs own certain copyrights, and if anyone interferes with them plaintiffs have their remedies under the copyright laws. The public is protected in the present situation—if Columbia has, in fact, misrepresented its product—by Sections 5 of the Federal Trade Commission Act.

In *California Apparel Creators v. Wieder of California* (July 30, 1947), 162 F. 2d 893, a group of manufacturers and dealers in wearing apparel, located in the State of California, brought an action for unfair competition against manufacturers and dealers in wearing apparel located in New York. Plaintiffs sought damages and an injunction to prevent defendants from using the names "California" or "Californian" in connection with their businesses.

Plaintiffs asserted that California-made wearing apparel was superior in quality and design and that plaintiffs had spent large sums of money advertising their wares and had succeeded in getting this idea accepted by the buying public.

The trial court granted defendants' motions for summary judgment and the second circuit, Judge Clark writing the opinion, affirmed, pointing out that:

"So far as the consumer is concerned, he is not dependent upon the private remedial actions brought by competitors; for the remedies under the Federal Trade Commission Act, at least as amended in 1938, 15 U. S. C. A. § 45, are now extensive, and are employed by the Commission to prevent misleading of the public as to the origin of an article sold at retail. Here, therefore, we are concerned only with

the remedial rights of individual businesses and whether or not such businesses have been damaged by the unfair competition of the defendants." (P. 896; emphasis added.)

"Turning, therefore, to the merits of the claim for unfair competition, we find, it of course settled that a geographical name, indicative of the place of manufacture, cannot be appropriated as a trademark. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 464, 14 S. Ct. 151, 37 L. Ed. 1144; *Canal Co. v. Clark*, 80 U. S. 311, 13 Wall. 311, 20 L. Ed. 581; *La Touraine Coffee Co. v. Lorraine Coffee Co.*, 2 Cir. 157 F. 2d 115, certiorari denied *Lorraine Coffee Co. v. La Touraine Coffee Co.* 329 U. S. 771, 67 S. Ct. 189. But, as plaintiffs contend, a geographical name may acquire a secondary significance which will support an action for unfair competition. Our case concerns that question; we have to see whether or not plaintiffs have such rights in the name of their state that defendants' use thereof is deceptive to their potential customers and causes them injury and loss.

"In the development of this branch of the law the name or mark acquired its secondary or actionable significance as identification of the source of manufacture of the goods, and hence as showing the origin of the goods. Hence we find the rule so often stated that to establish such a secondary meaning, while it is not necessary to show that the public has become conscious of the personal identity of the manufacturer, yet *it must be shown that whatever is asserted to carry the secondary meaning has come to signify origin from a single, though anonymous, source.* *Crescent Tool Co. v. Kilborn & Bishop Co.*, 2 Cir. 247 F. 299; *Coty, Inc. v. Le Blume Import*

Co., D. C. S. D. N. Y. 292 F. 264, affirmed 2 Cir., 293 F. 344; *Shredded Wheat Co. v. Humphrey Cornell Co.*, 2 Cir., 250 F. 960; *Coca Cola Co. v. Koke Co., of America*, 254 U. S. 143, 146, 41 S. Ct. 113, 65 L. Ed. 189; cases collected 150 A. L. R. 1092, 1093; 3 Restatement Torts, 1938, §715, comment b, §727, comment a, §730, comment a. 'Indeed,' as Judge Learned Hand put it in *Bayer Co. v. United Drug Co.*, D. C. S. D. N. Y., 272 F. 505, 509, 'the whole law of "secondary meaning" is built upon that presupposition. The same idea was expressed recently by the Supreme Court in *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 118, 59 S. Ct. 109, 113, 83 L. Ed. 73, when Justice Brandeis said: 'It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer.' To the same effect are *Elgin Nat. Watch Co. v. Illinois Watch-Case Co.*, 179 U. S. 665, 674, 21 S. Ct. 270, 45 L. Ed. 365, and *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U. S. 315, 336, 59 S. Ct. 191, 83 L. Ed. 195." (Pp. 897-8; emphasis added.)

"In *New York & R. Cement Co. v. Coplay Cement Co.*, C. C. E. D. Pa., 44 F. 277, 10 L. R. A. 833, rehearing with memorandum, C. C., 45 F. 212, the plaintiff was one of several cement manufacturers located at Rosendale, N. Y., who marketed their products under the name of 'Rosendale Cement.' The defendant manufactured cement elsewhere and sold it as Rosendale cement. Mr. Justice Bradley, sitting on circuit, applied the single-source rule strictly to defeat the plaintiff's claim of unfair competition. This case was cited with approval and even pressed further in *American Washboard Co. v. Saginaw Mfg. Co.*, 6 Cir., 103 F. 281, 50 L. R. A. 609, distinguished by the high authority of the bench

then sitting, with Day, J., writing the opinion with the concurrence of Judges Taft and Lurton. Here the court refused to enjoin defendant from representing its zinc washboards as 'Aluminum' at the suit of plaintiff, the sole manufacturer of washboards with aluminum rubbing surfaces, holding that plaintiff had not established its use of the name prior to defendant's, could not sue merely for deceit of the public, and failed because it did not show direct loss of customers or direct injury to itself.

"These cases of course are authorities against the plaintiffs' claims; but we need not go so far or decide to what extent they still represent the law. For we have precedents more direct and more apt from this circuit and from the Supreme Court. In *Ely-Norris Safe Co. v. Mosler Safe Co.*, 2 Cir. 7 F. 2d 603, Judge L. Hand, in discussing the *Coplay Cement* case, pointed out that it did not appear that the plaintiffs were the only persons making cement at Rosendale. He continued: 'There was no reason, therefore, to assume that a customer of the defendant, deceived as to the place of origin of the defendant's cement, and desiring to buy only such cement, would have bought of the plaintiffs. It resulted that the plaintiffs did not show any necessary loss of trade through the defendant's fraud upon its own customers.' . . . Finding that the plaintiff had alleged a monopoly from which the inference of loss of customers followed, he reversed the dismissal below.

"While this decision was in turn reversed by the Supreme Court, *Mosler Safe Co. v. Ely-Norris Safe Co.*, 273 U. S. 132, 47 S. Ct. 314, 71 L. Ed. 578, it was done on the ground that in this case, also, no exclusive right was shown by the plaintiff. The

plaintiff had a patent on an explosion chamber in a safe as protection against robbery. But as Justice Holmes points out, it was consistent with every allegation in the bill that there were other safes with explosion chambers besides that for which the plaintiff had a patent. Hence there appeared nothing to prevent the defendant from making a representation that its safes had an explosion chamber if the representation was true. He continued: 'If on the other hand the representation was false as it is alleged sometimes to have been, *there is nothing to show that customers had they known the facts would have gone to the plaintiff rather than to other competitors in the market, or to lay a foundation for the claim for a loss of sales.*' 273 U. S. 132, 134, 47 S. Ct. 314, 71 L. Ed. 578.

"This decision and the implication from the two opinions, construed together, have been widely accepted as prevailing law. *They constitute significant emphasis upon the need of individualizing the injury asserted, and thus point to the weak element of the plaintiffs' case here.* To recover damages or to receive protective relief against the actions of these defendants, plaintiffs must therefore show not only a representation by defendants which is false and deceitful in the sense of luring customers to their doors wrongfully, but also that plaintiffs have lost their own rightful custom thereby. This is a grant of summary judgment, and hence we must accept as facts those which the plaintiffs show they intend in good faith to prove. They must, however, dis-

close in their affidavits what they do intend to rely upon. *Engl. v. Aetna Life Ins. Co.*, 2 Cir., 139 F. 2d 469.

* * * * *

"It is nowhere claimed that there is, or will be, available any proof of specific customers diverted from specific plaintiffs through the actions of these defendants. The only possible suggestion of injury is by a strained process of inference, as by the suggested conclusion that the general effect of defendants' actions must have diverted customers from the plaintiffs. Here we are met with the direct difficulty found insurmountable by Justice Holmes in the *Ely-Norris Safe Co.* case, that there is no reason to assume that defendants' customers, deceived as to the place of origin, would otherwise have bought of these plaintiffs.

* * * * *

"True, the complaint here contains, in addition to the general allegations of superiority of the California clothes, certain general allegations that the inferior character of the defendants' clothes injures the reputation of California clothes.

* * * * *

"Were such injury by deleterious quality directly charged by specific and comparative facts, we would still be thrown back, however, on the question of lack of showing of loss to these particular plaintiffs, out of all the California manufacturers who conceivably might be injured. In other words, the difficulty found in the *Ely-Norris* case still exists in much more pointed fashion than it did there." (Pp. 899-901; emphasis added.)

It is not sufficient for plaintiffs to allege merely that defendant had no right to advertise as it did; plaintiffs must show a right in THEMSELVES which is legally protectible:

In *Ambassador Hotel Corp. v. Hotel Sherman Co.*, 226 Ill. App. 247, the Court, in affirming judgment for defendant (rendered after demurrer to complaint was sustained), wrote:

“The right of the complainants to the relief prayed for may not be predicated upon the weakness of the right of defendant to use the trade-name involved, but must be established, if at all, upon the affirmative fact that the complainants had such a property right in the use of the name as made the defendant’s use of it an infringement. In Maxwell v. Hogg, L. R. 2 Ch. 307 . . . Cairns, L. J., said: ‘The first question to be determined is, is there a right, or is there a property on the part of plaintiff, to be protected? For if there is only loss sustained, without there being a right of property to be protected, this court cannot interfere; and finally, I think we must leave out of the case any observation which may possibly have to be made with regard to the conduct of the defendant’.” (Emphasis added.)

Plaintiffs’ position in the case at bar is analogous to the position of a retail merchant who has purchased some goods from a manufacturer for resale. The retailer cannot maintain an action against a third person for misrepresenting his goods as those of the manufacturer either on the basis of trade-mark or unfair competition. The right to protect the mark or secondary meaning lies solely in the manufacturer. Thus, in *Krauss v. Jos R. Peebles’ Sons Co.*, 58 Fed. 585, it was held

that a vendee for resale (who had a five year exclusive contract with the vendor who had agreed not to permit others to use the mark) of a trade-marked article, could not maintain an action against a third person for piracy of the vendor's trade-mark.

In *Lacroix v. Nodal*, 6 So. 795, Nodal had a right, by license, to use the trade-mark of another. He complained that Lacroix had interfered with the trade-mark. The case was dismissed on the pleadings on the ground that no cause of action was stated. The Court wrote that Nodal was "not the owner of the trade-mark which they sought to vindicate, and . . . therefore, they had no cause or reason to judicially claim any other right than that of using it in their dealings under the authority of their" licensors.

In *Font & Co. v. Lopez Bros.*, 36 Puerto Rico Reports, 233, plaintiff imported and sold a certain product made by X and used X's trade-mark. Held: Plaintiff cannot enjoin defendant from infringement.

In *Richards & Company v. Butchee*, 62 L. T. Reps. 867, X agreed to consign their product for sale exclusively to plaintiff. Plaintiff sued defendant, a merchant, to enjoin the latter from selling the product in imitation of X's trade-mark. Held: plaintiff had no right to bring the action; it had no interest in the trade-mark and had no right to restrain the fraudulent use of it.

In a case involving the same principle, *Societe des Huclcs D'Olive de Nice v. Rorke*, 39 N. Y. Supp. 28, the Court, in affirming a judgment dismissing the complaint, wrote:

"To sustain this cause of action, it was *necessary* for the plaintiff to prove that the trade-mark or label, the use or imitation of which the action was brought

to enjoin, *was, plaintiff's trade-mark, invented and used by the plaintiff to designate its goods; and to the use of which it had the sole and exclusive right.* In this respect the plaintiff's proof fails." (P. 29; emphasis added.)

Whatever rights Clemens may have had prior to his death, based on unfair competition, plaintiffs did not acquire these rights and plaintiffs do not so allege. Plaintiffs *could not* have acquired any rights which formerly belonged to Clemens because Clemens, an author, did not have a "business" of such a nature that it could have been transferred. Plaintiffs inherited merely certain copyrights in specific Mark Twain stories. "Good will may not be sold or transferred separate from the business with which it is associated; and a trade-mark or trade name cannot be transferred separate from the good-will which it represents. Therefore, a trade-mark or name may not be transferred except with the business of which it is the outward sign." (*Nims Unfair Competition and Trade-marks*, 4th Ed. 1947, page 85.) "There is no property in a trade-mark apart from the business or trade-mark with which it is employed." *American-Steel Foundries v. Robertson*, 269 U. S. 372, 381, 70 L. Ed. 317-320.

Plaintiffs devote pages of the section of their opening brief entitled "B. As to Unfair Competition" (pp. 17-19) to further reference to authorities on technical trade-marks. Defendant feels that no other answer is required of it than a reference to the first portion of this brief which relates to trademarks.

Plaintiffs state (Op. Br. 19) that the courts, "without specifically saying so, have restrained the use of a title of a literary property" on the theory of "dilution."

That is not true. All of the cases in which defendant was restrained from using the title of plaintiff's literary work, were cases of unfair competition involving passing off; in each, plaintiff had proven secondary meaning. Thus, in perhaps the best known of these cases, *Warner Bros. v. Majestic Pictures Corporation*, 70 F. 2d 310, plaintiff had made a series of photoplays under the title "GOLD DIGGERS" which they had extensively advertised and from which their revenues had amounted to several million dollars. Before plaintiff's last picture under that title had been completed, defendant produced a motion picture "GOLD DIGGERS OF PARIS." The Court held that the title "GOLD DIGGERS" had acquired a distinctive secondary meaning and that the use of "GOLD DIGGERS" would falsely represent to the public that defendant's picture was produced by plaintiff. Plaintiff was granted an injunction restraining defendant from using the words "GOLD DIGGERS" in connection with its picture unless defendant affixed thereto a notice that the picture was its own production and was not based upon the plaintiff's pictures.

Compare the *Gold Diggers* case with *Jackson v. Universal International Pictures*, 95 A. C. A. 99 (Calif.), decided late 1949. Plaintiff there had written a stage play entitled "SLIGHTLY SCANDALOUS" and had produced and advertised it; thereafter defendant released and distributed throughout the country a motion picture also entitled "SLIGHTLY SCANDALOUS." "There was no similarity whatever between the picture and the play except the title." The trial court's judgment in favor of plaintiff was reversed on the ground that, although plaintiff had pleaded and offered evidence to support its allegation of secondary meaning, that evidence was not sufficient to *prove* secondary meaning. "The acquisition of a sec-

ondary meaning creates a right akin to a property right. Without such acquisition that is no right. . . . The essence of appellants' wrong, if one was committed, was in the distribution of a motion picture which, from its title, the public generally would mistakenly conclude was made from respondent's play. (See *Armstrong Paint & V. Works v. Nu-Enamel Corp.*, 305 U. S. 315, [59 S. Ct. 191, 83 L. Ed. 195, 207].)" (P. 104; emphasis added.)

As defendant has asserted, it is clear that the name, Mark Twain, is not capable of acquiring a secondary meaning in connection with literary property, and plaintiffs have, in fact, affirmatively pleaded that the name, Mark Twain, indicates only the writings of Samuel Clemens; that is, that it has only its *primary* meaning.

The *Vogue*, *Wall*, *Dunhill*, *Academy* and *Tiffany* cases, cited by plaintiffs (Op. Br. 19-22), are all cases of unfair competition. They are not relevant to the question of whether plaintiffs here are entitled to a technical trade-mark. They involved secondary meaning and "passing off." Defendant does not dispute that in unfair competition cases *once a plaintiff establishes secondary meaning* (referring to plaintiffs) there may be no requirement that defendant be in direct competition with plaintiff. But, as already pointed out, no secondary meaning is alleged in the instant, nor is it possible so far as literary property is concerned. "Mark Twain" used in connection with such stories will always have its primary meaning: a proper name, indicating the author. (The secondary meaning—inconceivable here—would be plaintiffs.)

The *Elastic Stop-Nut* and *Lady Esther* cases, decided in Illinois, referred to by plaintiffs (Op. Br. 21), are also unfair competition cases. They simply state that plaintiff does not have to prove *actual* "palming off" by defendant of the latter's goods as the goods of plaintiff, but that it is sufficient if such "palming off" is likely. "Secondary meaning" still is the essence of these cases. Plaintiffs seem to confuse the requirement of "secondary meaning" with that of actual "palming off." If this distinction is not recognized, then the entire concept of secondary meaning, now recognized by every court in this country, is overturned. Secondary meaning is dispensable only when defendant has misappropriated something of value from *plaintiff*—for example, his goodwill and reputation.

See:

Palmer v. Gulf Pub. Co., 79 Fed. Supp. 731.

The *Uproar* case (Op. Br. 23) holds merely that once a person has the exclusive right to the use of another's name, that right having been acquired by contract, he can enjoin others from using it, but *defendant's point in the case at bar is that plaintiffs have no exclusive right to the use of the name Mark Twain either by virtue of trade-mark or other unfair competition principles*. In the *Uproar* case, the Court enjoined the misappropriation of a substantial exclusive right owned by the other party because of grant by contract. No misappropriation from plaintiffs can be found in the case at bar.

Almost the entire bulk of plaintiffs' brief is concerned with the extent of their rights *if* they have a valid trade-mark or a secondary meaning. It is submitted that defendant has shown that they do not have either. *The only thing plaintiffs inherited from Mark Twain were rights in specific copyrighted stories.*

Plaintiffs urge the Court to extend the law to protect them in the case at bar. They have cited no cases either in trade-mark or unfair competition to justify their position.

"The fact that no precedent can be found to sustain an action in any given case is cogent evidence that a principle does not exist upon which the right may be based."

Roberson v. Rochester Folding Box Company, 171 N. Y. 538, 59 L. R. A. 478, 481.

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP and
LEONARD A. KAUFMAN,

Attorneys for Defendant, Columbia Pictures Corporation.

No. 12554

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS G. CHAMBERLAIN and CENTRAL HANOVER BANK
& TRUST COMPANY, as Successor Trustees Under the
Last Will and Testament of Samuel L. Clemens, de-
ceased, MARK TWAIN COMPANY and CLARA CLEMENS
SAMOSSOUD,

Appellants,

vs.

COLUMBIA PICTURES CORPORATION,

Appellee.

PETITION FOR REHEARING.

HARRY E. SOKOLOV,

9441 Wilshire Boulevard, Beverly Hills,

Attorney for Appellants,

NATHAN E. GILLIN,

Of Counsel.

TOPICAL INDEX.

	PAGE
Grounds	1
Argument I. In making its decision, as indicated by the opinion, the court evidently took for granted that plaintiffs would not be able to prove certain facts which they had alleged in their complaint. Plaintiffs are entitled to have accepted as true, on a motion for dismissal of the complaint, the facts as alleged in the complaint.....	3
Argument II. The court has overlooked the true gravamen of the complaint. It is that defendant by falsely stating in its advertising of an inferior, poorly constructed, poorly made and badly told motion picture that it is based upon a Mark Twain story, whereas it bears only the remotest and most unfavorable resemblance thereto, directly injured plaintiffs who exclusively own and exploit all of the works of Mark Twain not in the public domain. This the opinion overlooks..	5
Argument III. The court in making its decision has relied largely upon cases antedating the Lanham Act and in so doing has failed to accord to plaintiffs the greatly expanded statutory protection as therein granted not only to owners of trademarks but to anyone whose economic position is likely to be damaged by misrepresentations.....	9
Argument IV. The court's decision insofar as it expresses itself on the subjects of "palming off," "direct competition" and "property rights" fails to give proper weight to the modern expansion of the doctrines relating to pleading and proof of a cause of action in unfair competition and relating to the nature of property rights.....	14
Conclusion	19

TABLE OF AUTHORITIES CITED.

CASES	PAGE
California Apparel Creators v. Weider of California, 162 F. 2d 893	11
Elastic Stop-Nut Corp. v. Green, 62 Fed. Supp. 363.....	14
Ely-Norris Safe Co. v. Mosler Safe Co., 7 F. 2d 603.....	10, 12
Fisher v. Star Company, 231 N. Y. 414, 132 N. E. 133.....	17
International News Service v. Associated Press, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211.....	17
Lady Esther Ltd. v. Lady Esther Corset Shoppe, 43 N. E. 2d 165	14
Metropolitan Opera Association, Inc. v. Wagner-Nichols Re- corder, 101 N. Y. S. 2d 483.....	14, 19
Mosler Safe Co. v. Ely-Norris Safe Co., 273 U. S. 132.....	11

STATUTES

United States Code Annotated, Title 15, pp. 285, 286.....	13
United States Code Annotated, Title 15, Sec. 1125....	4, 8, 9, 10, 12

TEXTBOOKS

Robert, The New Trademark Manual, pp. 14, 25.....	14
---	----

No. 12554

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS G. CHAMBERLAIN and CENTRAL HANOVER BANK
& TRUST COMPANY, as Successor Trustees Under the
Last Will and Testament of Samuel L. Clemens, de-
ceased, MARK TWAIN COMPANY and CLARA CLEMENS
SAMOSSOUD,

Appellants,

vs.

COLUMBIA PICTURES CORPORATION,

Appellee.

PETITION FOR REHEARING.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Your petitioner petitions for a rehearing of the judgment rendered herein on January 18, 1951, with a written opinion by Judge William E. Orr after a hearing before Judges Stephens, Bone and Orr.

Grounds.

I.

In making its decision, as indicated by the opinion, the court evidently took for granted that plaintiffs would not be able to prove certain facts which they had alleged in their complaint. Plaintiffs are entitled to have accepted as true, on a motion for dismissal of the complaint, the facts as alleged in the complaint.

II.

The Court has overlooked the true gravamen of the complaint. It is that defendant by falsely stating in its advertising of an inferior, poorly constructed, poorly made and badly told motion picture that it is based upon a Mark Twain story, whereas it bears only the remotest and most unfavorable resemblance thereto, directly injured plaintiffs who exclusively own and exploit all of the works of Mark Twain not in the public domain. This the opinion overlooks.

III.

The Court in making its decision has relied largely upon cases antedating the Lanham Act and in so doing has failed to accord to plaintiffs the greatly expanded statutory protection as therein granted not only to owners of trademarks but to anyone whose economic position is likely to be damaged by misrepresentations.

IV.

The Court's decision in so far as it expresses itself on the subjects of "palming off," "direct competition" and "property rights" fails to give proper weight to the modern expansion of the doctrines relating to pleading and proof of a cause of action in unfair competition and relating to the nature of property rights.

ARGUMENT I.

In Making Its Decision, as Indicated by the Opinion, the Court Evidently Took for Granted That Plaintiffs Would Not Be Able to Prove Certain Facts Which They Had Alleged in Their Complaint. Plaintiffs Are Entitled to Have Accepted as True, on a Motion for Dismissal of the Complaint, the Facts as Alleged in the Complaint.

Attention of the Court is respectfully called to that portion of its decision which states "in arriving at a conclusion as to whether the amended complaint states a cause of action *we take as true* all allegations well pleaded. We are not concerned with proof." (Emphasis ours.) The opinion then goes on "at first blush it might be said that the allegations made fit snugly into the provisions of *Sec. 1125 T. 15 U. S. C. A.*" But despite this specific statement of principles the opinion then goes on to indicate that the Court *disbelieves the truth* of the allegations. For example the opinion says "we could almost take judicial notice of the fact that the fame of 'Mark Twain' cannot be so easily marred." Appellant respectfully urges that this is not a matter for judicial notice but rather a matter of proof along lines that will be further expounded upon under a subsequent ground. That the writer of the opinion recognized that to take judicial notice in this manner would be improper is indicated by the subsequent statement "Of course we realize that a determination of the weight of the evidence that might be produced is not our function here." Yet the opinion in effect makes findings of fact contrary to the allegations of the complaint. Appel-

lant is entitled to his day in court which will certainly be denied him if he is not to be given his opportunity to make proof at trial of his allegations and to stand or fall upon such proof or failure thereof. A re-examination of its own opinion will, I think, convince this Court that in making its opinion it has been unduly swayed by its own views as to the extent of proof plaintiffs might be able to make at trial with respect to their allegations. It is the fact, and the opinion so distinctly states as above recited, that the case is one that falls squarely within the provisions of *Section 1125 T. 15 U. S. C. A.*, and naturally the allegations fit that section. The Court's opinion infers that the allegations were merely made to fit that section—and admits that they do so snugly—but apparently draws the conclusion that because the case as alleged is one that does fit so perfectly into the statute there must necessarily be no factual foundations for the allegations. This is indeed a strange and strained construction of the appellants' pleadings and in effect amounts to an accusation of false pleading in order to get one's case before the court.

Undoubtedly *Section 1125* was enacted in 1946 in the form as it now appears with situations in mind for which the statute is intended to give a remedy that did not earlier exist. We have such a situation in the case at bar. The situation has been alleged accordingly. Appellants are entitled to make proof at trial of those allegations. Since the allegations correspond to the statute if they are proved, the remedy not only exists but appellants become entitled to its benefits. This conclusion can be reached without the necessity for referring to any court decision which cannot, in any event, change the explicit language of the statute.

ARGUMENT II.

The Court Has Overlooked the True Gravamen of the Complaint. It Is That Defendant by Falsely Stating in Its Advertising of an Inferior, Poorly Constructed, Poorly Made and Badly Told Motion Picture That It Is Based Upon a Mark Twain Story, Whereas It Bears Only the Remotest and Most Unfavorable Resemblance Thereto, Directly Injured Plaintiffs Who Exclusively Own and Exploit All of the Works of Mark Twain Not in the Public Domain. This the Opinion Overlooks.

It would appear from the Court's decision that no weight whatsoever had been accorded the facts as alleged, and which it must be presumed could have been proved had the case been permitted to go to trial, that the making of a motion picture and describing it as "one of Mark Twain's favorite stories," as being based on a story written by Mark Twain, and as being "a story that only Mark Twain could tell" when none of this was true and when all of this false description was applied to an inferior picture, could not help but reflect adversely on and to damage directly the further useability of those of Mark Twain's stories of which plaintiffs are still the copyright owners—apart from the damage to the name "Mark Twain" as a trademark.

The trial court below and now this Court, judging by the former's remarks and the latter's opinion, seem to take the view without anything in the record to substantiate it, that the fame and reputation of Mark Twain and of his works cannot be diminished or damaged by any deleterious presentation of, by any false advertising of, or by any superimposition of the name "Mark Twain" on a work that is not his and which it is well-nigh libelous

to describe as his because of its great inferiority. Since the Court's opinion is in part at least not based upon the record, appellants respectfully submit in the same vein that the veneration held by the court and counsel in this case for Mark Twain, based possibly upon an intimate acquaintance from youth with Mark Twain's works, more emphasized in days gone by than now, does not necessarily reflect the situation with regard to the newest generations and those yet unborn. The present generation and those to follow may well judge the standing of Mark Twain's stories by what they see in motion pictures, television or other media of visual presentation and if that which they see presented and advertised as a story of or based upon a story of Mark Twain, is of an inferior quality they, in their minds, having no shining childhood memories to fall back upon, may take it for granted that anything else they may see that bears the name of Mark Twain is likewise inferior and will refrain from patronizing any presentation of Mark Twain stories. Though this Court's opinion speaks of such a result as being a "nebulous, far-fetched conclusion" actually is this not a conclusion only in the absence of evidence that might very well be presented at trial to show that it is not at all nebulous and not at all farfetched for the fame of Mark Twain, a writer whose popularity was at its peak at the end of the 19th Century to be seriously dimmed in the 1950's by an inferior presentation such as defendant's accompanied by false and misleading advertising as to its authorship when viewed by a generation who did not in their lifetime know Mark Twain or whose schooling has not emphasized the worth of his works or whose reading has been confined largely to contemporary works.

Though it is true that anyone has the right to use the works of an author when they fall in the public domain,

this does not necessarily lead to the conclusion there is a right to apply to a garbled, distorted, adulterated, inferior and completely unrecognizable version a "label" that would lead the public to believe that this is a genuine Mark Twain story. To do so immediately detracts from the value of all of Mark Train's works in the public eye and certainly directly damages the owner of the copyrights of those of his works that are not yet in the public domain. The damage in each instance may be comparatively small but if permitted once it can be repeated a thousand-fold and sooner or later the destruction of value of the property rights remaining in plaintiffs will be complete. The defendant did not content itself with saying the story was "suggested" by one of Mark Twain's but stated categorically "that it was one of Mark Twain's favorite stories" or in another advertisement that the picture was based upon the Mark Twain story "The Celebrated Jumping Frog of Calaveras County," again "a story only Mark Twain could tell" or "Mark Twain's favorite story" and even went so far as to state that it was based on a story written by Mark Twain entitled "Best Man Wins." The last was an outright falsehood since none of Mark Twain's stories were ever so entitled, and the rest of the advertising was almost as completely false—as could best be illustrated at trial by viewing the motion picture and comparing it to Mark Twain's story "The Celebrated Jumping Frog of Calaveras County." It is not only that the public is being deceived but it is also that the public taste will be diverted away from Mark Twain stories entirely if the situation complained of by appellants in their complaint is not corrected. Plaintiffs have a direct and exclusive property interest in the copyrighted Mark Twain stories and they should certainly have the right to ask the Court to protect that interest by preventing false, misleading and

deceptive advertising which diminishes the residual value of all of Mark Twain's works. The appellants and they alone, own such copyrighted works, and they, and they alone, are the ones to be damaged, and who are being damaged. At the very least they are entitled to the requested relief for an injunction against the continuance of the false advertising. Appellants' injury is the injury spoken of in *Section 1125*, they being within the category of "any person who believes that he is or is likely to be damaged by the use of any such false description or misrepresentation." Even apart from such statutory authority for relief there can be no more basic principle than that for every wrong there must be a remedy. The obvious remedy in this case and the remedy which should be applied to all similar ones that might hereafter arise, is to enjoin the defendant from deceiving the public as to the true nature of that which it is selling so far as its derivation is concerned and by such injunction to prevent a loss of public goodwill and patronage for that great field of Mark Twain copyrighted works which belong exclusively to these plaintiffs and for the protection of which they, and they alone, are entitled to seek relief. For the defendant to resist such an injunction is for it to take the position that the law allows it to lie freely about the authorship of the stories on which its motion pictures are based, without regard to the persons or interests, public or private, which might thereby be not only misled but damaged. Conversely the imposition of such injunction could not damage defendant unless it is actually profiting by falsely trading on the name of Mark Twain. If it is so trading and if by such trade it is damaging plaintiffs, then plaintiffs are not only entitled to an injunction but also to damages. If it is not so trading then it should have no objection to the imposition of the injunction.

ARGUMENT III.

The Court in Making Its Decision Has Relied Largely Upon Cases Antedating the Lanham Act and in so Doing Has Failed to Accord to Plaintiffs the Greatly Expanded Statutory Protection as Therein Granted Not Only to Owners of Trademarks but to Anyone Whose Economic Position Is Likely to Be Damaged by Misrepresentations.

The cases referred to in the Court's opinion were decided prior to the Lanham Act of 1946 which includes *Section 1125 T. 15 U. S. C. A.* in its present form and these cases were decided in the light of the statutes as they then existed. The Lanham Act however, revolutionized the whole pattern of trademark registration, the basis for registration, and laid down new rules of business conduct. There has not yet grown up any considerable body of law interpreting the Lanham Act, but the intent of Congress in passing it was obviously to provide a drastic broadening of the basis for trademark registration and of relief for unfair business practices and that obvious intent should not be disregarded. Though there is little case law as yet available interpreting *Section 1125*, its language is so explicit and so clear that no interpretation should be required. Defendant does not and cannot deny that its representation of its picture "Best Man Wins" as being a story of Mark Twain is false. It is a false designation, description, and representation of origin. The complaint states, and it must be assumed on a motion for dismissal that it can be proved, that plaintiffs are persons who have a right to believe that they are damaged or are liable to be damaged by the use of such false description and representation and this without regard to whether they do or do not have or possess a valid trademark in the

name Mark Twain as such. By their false representations of origin coupled with an inferior production unworthy of the name Mark Twain, defendant has definitely damaged the plaintiffs who undeniably own a great body of Mark Twain's copyrighted works and who in addition have registered the name Mark Twain as a trademark and who have at least a record claim to the name Mark Twain as a trademark by their registration of it. In any event the remedies of *Section 1125* are not confined to those whose trademarks are violated but is extended equally to those whose economic position is injured by such false representation. This is precisely the case at bar. In enacting *Section 1125* Congress may well have had in mind the language of *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F. 2d 603 at 604, wherein the Court said "there is no part of the law which is more plastic than unfair competition and what was not reckoned an actionable wrong 25 years ago may have become such today." The Court was not far off in its timing. That case was decided in 1925 and in 1946 the current legislation as herein referred to was passed. The basis of such legislation was more or less outlined in the following language from the same case "while a competitor may, generally speaking, take away all the customers of another that he can, there are means which he must not use. One of these is deceit. The false use of another's name as maker or source of his own goods is deceit of which the false use of geographical or descriptive terms is only one example * * * It is as unlawful to lie about the quality of one's wares as about the maker; it equally subjects the

seller to action by the buyer.” Though it is true that this case was subsequently reversed by the Supreme Court in *Mosler Safe Co. v. Ely-Norris Safe Co.*, 273 U. S. 132, as Judge Hand points out in his dissenting opinion in *California Apparel Creators v. Weider of California*, 162 F. 2d 893 at 902, the reversal did not affect the above quoted doctrines “which the Supreme Court did not disturb upon the appeal” but it was instead reversed because “the Supreme Court disagreed with our reading of the Bill of Complaint.” Incidentally as to the last cited case the 1946 trademark act was inapplicable since that case was based upon a situation arising prior to the effective date of that act. As the footnote in the *California Apparel* case points out, at page 900, “The Lanham Trademark Act of July 5, 1946, makes two important changes, in that it omits the requirement of wilfulness or intent to deceive and extends the liability ‘to a civil action’ by ‘any person who believes that he is or is liable to be damaged by the use of any such false description of representation’

* * * the amendment is expected to produce a more effective remedy.” It is most appropriate to further call attention to the dissenting opinion in the *California Apparel* case in which Judge Hand critically says, “We are affirming a summary judgment cutting off the plaintiffs from any trial because they have not been able in their affidavits to make out a *prima facie* case.” He then goes on to point out that cases relating to unfair competition are the last kind of action in which to invoke the remedy of summary judgment. Such remarks are particularly

pertinent when we take into consideration that in the case Judge Hand had under consideration the affidavits did not make out a *prima facie* case whereas in the case at bar the allegations of the complaint, if this Court were of the opinion they could be proved, would definitely make out a *prima facie* case under *Section 1125*. Appellants respectfully urge that this Court inadvertently misapprehended the nature of the remedy available to plaintiffs when it stated in its opinion "In order to entitle appellants to the relief sought it will be necessary for them to allege that they have an exclusive right to the use of the story in question." *Section 1125* obviously removes the necessity for proving a monopolistic right in plaintiffs. Furthermore the complaint is not based upon the use of the story "The Celebrated Jumping Frog of Calaveras County" by defendant but upon the fact that it purported to use such story but did not do so and instead produced a story which was not one of Mark Twain's works, was falsely represented to be such, was most inferior in nature and which combination of circumstances definitely damaged those holding property rights, in the name of Mark Twain and in his copyrighted works, to wit the plaintiffs. The cited language of this Court and that which follows "and they must be injured directly by appellee's acts" refers to the *Ely-Norris* case whose holding has now been superseded by the Lanham Act and is therefore no longer the law on the subject since the Act does not require proof of anything other than the fact that a person believes that he is or is *liable to be damaged* by a false description or representation.

As a general commentary on the entire situation involved in this case one can do no better than to refer to Daphne Robert's commentary on the Lanham Trademark Act appearing in *T. 15 U. S. C. A.*, at pages 285, 286, in which it is pointed out that "the new act gives to citizens and residents of the United States the same protection against unfair competition as has been afforded nationals under the Conventions and the acts which are made unlawful are those that are set out in the Conventions * * * 1. Every act of competition contrary to honest practice in industry or commercial matters; 2. All acts whatsoever of a nature to create confusion by no matter what means with the establishment, the goods, or the services of a competitor; 3. False allegations in the course of trade of a nature to discredit the establishment, the goods or the services of a competitor." The three subdivisions are cited from the International Convention. The author then cites similar and more detailed prohibited acts under the Inter-American Convention and then states "this constitutes the Federal Code of Unfair Competition under the new statutes." It is obvious in the instant case that that which the defendant is doing is contrary to honest practice in commercial matters, is definitely of a nature to create confusion as to what is and what is not a legitimate work of Mark Twain and constitutes false allegations in the course of trade of a nature which would definitely discredit the works of Mark Twain as controlled by plaintiffs.

ARGUMENT IV.

The Court's Decision Insofar as It Expresses Itself on the Subjects of "Palming Off," "Direct Competition" and "Property Rights" Fails to Give Proper Weight to the Modern Expansion of the Doctrines Relating to Pleading and Proof of a Cause of Action in Unfair Competition and Relating to the Nature of Property Rights.

As stated in Daphne Robert's "The New Trademark Manual", pages XIV and XV "Passing off is the sale of one man's goods as another's without copying his trademark. The development of law was in danger of being halted by this supposed limitation of the term unfair competition. Happily, unfair competition soon became applied to conduct which did not involve passing off. It was extended to include misappropriation of trade values as well as misrepresentation, and in general to acts which artificially and injuriously interfere with the normal course of trade." This view is supported in the cases of *Elastic Stop-Nut Corp. v. Green*, 62 Fed. Supp. 363, and *Lady Esther Ltd. v. Lady Esther Corset Shoppe*, 43 N. E. 2d 165. The law on this subject has been recently and ably expounded in *Metropolitan Opera Association, Inc. v. Wagner-Nichols Recorder*, 101 N. Y. S. 2d 483, and the facts in that case are in large measure appropos to the case at bar. In that case the Metropolitan Opera Assn., Inc., of New York had over a period of sixty years created a worldwide audience for its performances and thereby a large market for phonograph recordings and radio performances of its broadcasts. It sold to American Broadcasting Company the exclusive right to broadcast its performances and to Columbia Records the exclusive right to record its performances. The defendant made recordings

of the performances when radio broadcast and from these records made up recordings which they advertised and sold as records of broadcast Metropolitan Opera performances. The records were extremely inferior in nature and based upon their lack of quality alone Metropolitan Opera would not have approved their sale and release to the public. Metropolitan Opera was threatened with loss of revenue, however, since defendants were selling their inferior records at a price far below the market for records made under proper supervision and with proper attention to standards of artistic and technical excellence. The complaint asked for an injunction against the continuance of such practices as well as for damages and for an accounting. The defendants urged that the complaint failed to state a cause of action in that it did not allege that the defendants were "palming off" their recordings as those of plaintiffs or that plaintiffs were in competition with the defendants and further defended on the ground that plaintiffs had no property rights in the broadcast of performances and defendants were therefore free to record the performances and sell the recordings. The defendants filed a motion for dismissal which was heard together with plaintiffs' motion for preliminary injunction. The dismissal was denied and the injunction granted.

The Court in its opinion carefully analyzed the expansion of the doctrine of unfair competition, stating with respect to this doctrine "it is an outstanding example of the law's capacity for growth in response to the ethical as well as to the economic needs of society. As a result of this background the legal concept of unfair competition has evolved as a broad and flexible doctrine with the capacity to further growth to meet changing conditions

* * * The statement of a sufficient cause of action in

unfair competition, in the last analysis, is therefore dependent more upon the facts set forth and less upon technical requirements than in most causes of action." The Court then points out that initially there was considered essential an allegation of "palming off" as being "the fraudulent representation of the goods of the seller as those of another." The Court then states that the doctrine has extended far beyond the cases involving "palming off" and "the extension resulted in the creating of relief in cases where there was no fraud on the public but only a misappropriation for the commercial advantage of one person of a benefit or 'property right' belonging to another." After citing cases at great length on the point at pages 489, 490 and 491 of the opinion the Court then concludes that "an allegation of 'palming off' is not essential to a cause of action for unfair competition."

As to defendants objection that the complaint does not include an allegation that the parties are actual competitors the Court in the same case stated at page 492:

"the existence of actual competition between the parties is no longer a prerequisite [citing a long list of cases] * * * the modern view as to the law of unfair competition does not rest solely upon the ground of direct competitive injury but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality and a court of equity will penetrate and restrain every guise resorted to by the wrongdoer. The courts have thus recognized that

in the complex pattern of modern business relationships, persons in theoretically non-competitive fields may, by unethical business practices, inflict as severe and reprehensible injuries upon others as can direct competitors.”

In commenting on the defense that plaintiffs had no property rights which it could protect in the action, the Court in the same case called attention to the case of *Fisher v. Star Company*, 231 N. Y. 414, 132 N. E. 133, in which the New York Court of Appeals quoted the broad definition of a property right as laid down by the Supreme Court of the United States in *International News Service v. Associated Press*, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211, and then stated at page 495:

“the court enjoined the defendants from using ‘Mutt and Jeff’ in connection with cartoons not drawn by the plaintiff. The reasoning of the court is of interest. It stated 231 N. Y. at page 433, 132 N. E. at page 139, 19 A. L. R. 937: ‘If appellant’s employees can so imitate the work of the respondent that the admirers of ‘Mutt and Jeff’ will purchase the papers containing the imitations of the respondent’s work, it may result in the public tiring of the ‘Mutt and Jeff’ cartoons by reason of inferior imitations or otherwise, and in any case in financial damage to the respondent and an unfair appropriation of his skill and the celebrity acquired by him in originating, producing and maintaining the characters and figures so as to continue the demand for further cartoons in which they appear.’ The reasoning is also applicable to the instant case.”

That reasoning is also applicable to the case at bar and peculiarly so.

In rejecting defendants' assertions that plaintiffs had no protectible property right the Court stated at page 498 "Equity will not bear witness to such a travesty of justice; it will not countenance a state of moral and intellectual impotency. Equity will consider the interests of all parties coming within the arena of the dispute and admeasure the conflict in the scales of conscience and on the premise of honest commercial intercourse."

Lastly on the subject of the preliminary injunction and very apropos of the arguments heretofore made in this petition, the Court at page 500 states:

"Such injury as may be inflicted on the defendants is the direct result of their unconscionable business practices and their invasion of the moral standards of the market place. The cry of the defendants that others similarly transgress does not confer immunity on them for their forbidden activities, nor may they find solace in the claim that they have not been guilty of common-law fraud. It already appears that this is not necessary. They have embarked upon a hazardous enterprise which equity will not hesitate to strike down. Cast in its proper environment, we have here a business venture purposed to gather in the harvest the seeds of which were planted and nurtured by others at great expense and with consummate skill."

"The conclusion here reached is not an onslaught on the currents of competition; it does not impose shackles on the arteries of enterprise. It simply quarantines business conduct which is abhorrent to good conscience and the most elementary principles of law and equity."

Conclusion.

Based upon the foregoing grounds as such grounds are largely summarized in the case of *Metropolitan Opera Association, Inc. v. Wagner-Nichols Recorder Corp.*, it seems evident that plaintiffs should be permitted to make proof of their allegations by evidence at trial, that far less harm and the least injustice can result by permitting the case to go to trial on its merits, that modern theory and practice, assuming plaintiffs' allegations be proved, would justify the relief prayed for by plaintiffs and appellants therefore respectfully urge that a rehearing be granted in this matter and that the Court's opinion be reconsidered.

Respectfully submitted,

HARRY E. SOKOLOV,

Attorney for Appellants,

NATHAN E. GILLIN,

Of Counsel.

Certificate of Counsel Under Rule 25.

I hereby certify that in my opinion the grounds as stated in the foregoing petition for rehearing are well founded and said petition is not interposed for the purpose of delay.

HARRY E. SOKOLOV,

Attorney for Appellants.



No. 12555

United States
Court of Appeals
for the Ninth Circuit.

LEONARD WOYNICZ, Also Known as Leonard
Woynicz Sianozecki,

Appellant,

vs.

ALEXANDRA WOYNICZ, also known as Alex-
andra Woynicz Sianozecki,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED
AUG 19 1950

PAUL P. O'BRIEN,

No. 12555

United States
Court of Appeals
for the Ninth Circuit.

LEONARD WOYNICZ, Also Known as Leonard
Woynicz Sianozecki,

Appellant,

vs.

ALEXANDRA WOYNICZ, also known as Alex-
andra Woynicz Sianozecki,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended and Supplemental Complaint.....	20
Exhibit B—Schedule of Payments Made by Defendant	23
Answer	11
Appeal:	
Appellant's Designation of Record on....	337
Notice of	38
Appellant's Designation of Record on Appeal.	337
Appellant's Statement of Points.....	335
Certificate of Clerk.....	332
Depositions of:	
Klaw, Jack	267
Sianozecki, Leonard Woynicz.....	280
Simon, Joseph L.....	250
Zimmerman, J. Charles.....	223
Exhibit "A" to Original Complaint.....	3

	INDEX	PAGE
Exhibit, Defendant's:		
A—Letter Dated December 9, 1942.....		165
Exhibits, Plaintiff's:		
No. 1—Agreement		44
2—Letter Dated March 3, 1947.....		55
4—Stipulation Re Deposition of Plaintiff		59
5—Deposition of Alexandra Woynicz		61
11—Deposition of Leonard Woynicz Sianozecki		102
11—Deposition of J. Charles Zimmer- man		161
12—Deposition of Joseph L. Simon...		163
13—Deposition of Jack Klaw.....		164
Findings of Fact and Conclusions of Law.....		33
Judgment for Plaintiff After Trial.....		36
Minute Order Dated March 24, 1950.....		31
Motion by Defendant to Amend Findings and to Make Findings More Certain and Objec- tions to Findings and Notice of Motion.....		28
Motion for New Trial and Notice of Motion for New Trial		25
Names and Addresses of Attorneys.....		1
Notice of Appeal.....		38

INDEX	PAGE
Reporter's Transcript of Proceedings.....	39
Stipulation Amending Complaint.....	18
Stipulation — Answer to Complaint to Be Deemed Answer to Amended and Supple- mental Complaint	24
Substitution of Attorneys (Defendant).....	2
Witnesses, Defendant's:	
Baro, Dr. Walter Z.	
—direct	137
—cross	146
—redirect	158
Kuhrke, Wanda Woynicz	
—direct	115
—cross	130
Tanner, Edmund George	
—direct	106
—cross	113
Witness, Plaintiff:	
Woynicz, Leonard	
—direct	43, 64, 82
—cross	84
—redirect	102
—recross	105

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JERRY B. RISELEY,
812 Bartlett Bldg.,
215 West Seventh St.,
Los Angeles 14, Calif.

For Appellee:

DANIEL A. WEBER,
208 S. Beverly Drive,
Beverly Hills, Calif.

In the District Court of the United States, Southern District of California, Central Division

No. 9324 PH

ALEXANDRA WOYNICZ, Also Known as
ALEXANDRA WOYNICZ SIANOZECKI,
Plaintiff,

vs.

LEONARD WOYNICZ, Also Known as LEONARD WOYNICZ SIANOZECKI,
Defendant.

SUBSTITUTION OF ATTORNEYS
(Defendant)

Defendant hereby substitutes Jerry B. Riseley as his attorney of record in place of L. J. Styskal and Jerry B. Riseley.

Dated Nov. 4, 1949.

/s/ LEONARD WOYNICZ.

We consent to the above substitution.

Dated Nov. 7, 1949.

/s/ L. J. STYSKAL.

/s/ JERRY B. RISELEY.

Above substitution accepted.

Dated Nov. 8, 1949.

/s/ JERRY B. RISELEY.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 9, 1949.

EXHIBIT "A" TO ORIGINAL COMPLAINT

Whereas, the wife wishes to discontinue and terminate the aforementioned action; and

Whereas, it is the intention of the parties to continue to live separate and apart forever, and in view of their irreconcilable estrangement the husband desires to make provisions for the support and maintenance of the wife, and for the custody, support and maintenance and education of Robert;

Now, Therefore, in consideration of the premises and the mutual promises and undertakings herein contained, the parties agree:

First

This agreement shall take effect as of August 23rd, 1942, and continue for the natural lives of both parties, unless previously terminated by the occurrence of any one or more of the following:

- a. The death of the wife.
- b. The remarriage of the wife.
- c. The granting of a decree of divorce in favor of the husband against the wife by a court of competent jurisdiction in the State of New York provided the granting of such decree is based on the ground that the wife is living in open and notorious adulterous relations.
- d. The repudiation of this agreement by consent of the parties provided said repudiation is in

writing and duly signed and acknowledged by each of the parties hereto.

e. The death of the husband, but nothing herein contained shall be deemed to relieve the estate of the husband from any obligation incurred hereunder by the husband prior to his death.

Second

From the date hereof the parties may and shall continue to live separate and apart for the rest of their natural lives and each shall be free from interference, authority and control, direct or indirect, by the other as fully as if sole and unmarried. Each may, for his or her separate use and benefit, engage in any employment, business or profession which he or she may deem advisable. Each may reside at such place or places as he or she may select.

Third

The wife shall own, have and enjoy independently of any claim or right of the husband, all silverware, pictures, portraits, books, household furniture, china, glassware, rugs, and other household effects of every kind and description now located in the top floor apartment at 2929 Wellman Avenue, Borough of Bronx, City and State of New York, and the garden tools and equipment now located at the aforesaid premises, and also all wearing apparel, personal ornaments, and other per-

sonal property belonging to the wife and now in her possession, or held by her, or which shall hereafter belong or come to her.

Fourth

The husband shall, within six (6) weeks from date hereof, remove from the premises mentioned in the preceding paragraph, all of his personal tools, books and wearing apparel wherever the same may be located.

Fifth

The parties have carefully weighed the question of the custody of Robert. In doing so they have been guided solely by considerations touching upon Robert's welfare. They are convinced that the following disposition will be for the best interests of Robert:

a. The husband shall have the sole custody, control and education of Robert. He shall be responsible and liable for his adequate support, maintenance and education consistent with his financial means, environment, and mode of living.

b. Should Robert desire to live or visit with the wife, at any time or times hereafter, the husband shall not prevent the fulfillment of said desire or desires, and during Robert's said visits or living with the wife, the husband shall remain responsible and liable for his adequate support, maintenance and education consistent with his financial conditions, environment and mode of living.

Sixth

So long as the wife shall fully keep, observe and perform the covenants and conditions to be kept, observed and performed by her under this agreement the husband shall pay to the wife, for her sole support and maintenance, the sum of Fifty (\$50.00) Dollars a week, on the first day of each and every week commencing with August 23rd, 1942, during her natural life, unless this agreement is earlier terminated as herein provided.

Seventh

In consideration of the provisions herein made for her, the wife has simultaneously herewith withdrawn the action for separation which she has heretofore commenced against the husband in the Supreme Court of the State of New York, County of Bronx; and she has likewise withdrawn the motion made in such action for alimony and counsel fees. The counsel fees of the wife, amounting to \$350.00 have been paid simultaneously herewith by the husband to the wife's attorney, Jack Klaw, Esq., of 521 Fifth Avenue, New York City, who has accepted the same in full satisfaction as to the husband's liability for the services rendered by him in connection with the preparation of this agreement and also in connection with the wife's aforesaid separation action.

Eighth

If the husband defaults in the due performance of any of the terms, conditions, and covenants of this agreement on his part to be performed, the wife shall have the right to bring an action either for a legal separation or for support and maintenance, or for both, and in any such action she shall have the right to ask for and obtain temporary and permanent alimony and counsel fees.

Ninth

Unless terminated as in paragraph "First" aforesaid, this agreement shall survive any order for the payment of alimony, temporary or permanent, which may be made in any action which hereafter may be instituted between the parties for separation or divorce, and/or any interlocutory or final judgment or decree in such action granting or denying such alimony, and/or any order modifying such order, judgment or decree in such action, and this agreement shall not be merged in any of the aforementioned orders, judgments or decrees, but shall survive the same.

Tenth

The payments required to be made hereunder by the husband to the wife shall be made by money order or good check and shall be sent by mail to the wife directed to her address above indicated. The wife may from time to time specify other ad-

dresses to which said payments shall be mailed. The husband shall not receive any credit for any payments hereunder unless said payments shall have been actually received by the wife. But no default shall be deemed to have occurred unless the husband shall have failed to cure any such default within five days after the mailing of notice of such default to him by registered mail.

Eleventh

The husband simultaneously herewith, does execute and deliver to the wife, a deed to premises 2929 Wellman Avenue, Bronx, and the lots adjacent thereto now owned by the husband, free and clear of any liens or claims, conveying to the wife a life interest therein with remainder to the children of their marriage, as joint tenants with the right of survivorship. In the event that the taxes, assessments, water rates, water charges and premium for adequate fire insurance affecting said property are not paid when payable and if the same remain unpaid for more than ten (10) days after notice from the husband in writing requesting the wife to pay the same, the husband shall have the right to pay the same and deduct from the weekly payments provided for in paragraph "Sixth" hereof, the sum of Ten (\$10.00) per week until he shall have been completely reimbursed for the payment so made by him.

In the event of any notice of violation or order or demand from any municipal, state or federal

department as may effect the aforesaid premises, then the wife agrees to remove or comply with the same within the reasonable time and upon her failure so to do, the husband shall have the right to remove or comply with the same and shall have the right to deduct from the weekly payments provided in paragraph "Sixth" hereof, the sum of Ten (\$10) Dollars per week until he shall have been completely reimbursed for such payments.

Anything to the contrary notwithstanding, the husband agrees that said life interest of the wife shall survive any order, judgment or decree which may be made in any action which may hereafter be instituted between the parties for separation or divorce, except that the said life interest of the wife shall not survive the granting of a decree of divorce in favor of the husband against the wife by a court of competent jurisdiction in the State of New York provided the granting of such decree is based on the ground that the wife is living in open and notorious adulterous relations.

Twelfth

This agreement shall enure to the benefit of, and shall be binding upon, the parties hereto, their heirs, executors, administrators, and assigns; and the obligations of the husband hereunder incurred prior to his death shall survive his death, and shall be binding on his estate.

In Witness Whereof, the parties hereto have

hereunto set their respective hands and seals this
22d day of September, 1942.

ALEXANDRIA WOYNICZ
SIANOZECKI,

Wife. (L. S.)

LEONARD WOYNICZ
SIANOZECKI,

Husband. (L. S.)

State of New York,
City of New York,
County of New York—ss.

On this 23rd day of September, 1942, before me
personally came and appeared Alexandra Woynicz
Sianozecki, to me known and known to me to be
the individual described in, and who executed the
foregoing agreement, and duly acknowledged to me
that she executed the same.

/s/ JACK KLAU,

Notary Public, Bronx County.

Term Expires March 30, 1944.

State of New York,
City of New York,
County of New York—ss.

On this 22nd day of September, 1942, before me
personally came and appeared Leonard Woynicz
Sianozecki, to me known and known to me to be

the individual described in, and who executed the foregoing agreement, and duly acknowledged to me that he executed the same.

/s/ JOSEPH L. SIMON,
Notary.

Commission Expires March 30, 1943.

[Endorsed]: Filed March 4, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to the complaint of the plaintiff on file herein avers:

First Defense

I.

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

I.

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

II.

Defendant denies the allegations of paragraph II of the complaint.

III.

Defendant denies the allegations of paragraphs III, IV, V, VI, VII, VIII and IX of the complaint.

Third Defense

I.

If defendant did enter into an agreement with the plaintiff as mentioned in the complaint defendant avers that such agreement was procured by duress; that the facts constituting such duress are as follows: That in July, 1942, the plaintiff, without warning, filed and instituted a certain action for separate maintenance in the Court of New York State and therein alleged and made accusations against the defendant, which were fabrications out of the whole cloth, including accusations of infidelity on the part of the defendant, which plaintiff well knew to be untrue and without foundation in fact. That this action was brought and prosecuted while defendant was working from twelve to eighteen hours per day on war work and caused the defendant the greatest anguish and worry. That the defendant in an effort to dispose of said action in order that he could devote his time and attention to his war work, as aforesaid, was forced to sign papers by the plaintiff, the terms and conditions of which defendant would never have consented to had he been aware thereof and properly advised by counsel and had he not been completely distracted by the false accusations made

against him and the embarrassment and anguish caused by them; that the papers signed by defendant were dated September 22, 1942, and defendant avers on information and belief that the agreement styled Exhibit "A" of the complaint are those papers.

Fourth Defense

I.

Defendant avers that if he signed such an agreement as Exhibit "A" of the complaint, that it was at a time when the mental stress, worry, anguish and concern over his war work and the whereabouts and welfare of his son in the service had rendered the defendant temporarily incompetent and mentally unfit to contract; that from about May, 1942, to September 22, 1942, the date of the alleged execution of the purported agreement, the defendant had been and was under doctor's care; that the defendant was at that time fifty-eight (58) years of age, not completely recovered from an appendectomy complicated by peritonitis, and under severe mental stress, worry and anguish brought on by the following circumstances: Plaintiff had instituted a certain legal action in the State of New York and therein made accusations of infidelity on the part of the defendant which were untrue and without foundation in fact, and which the plaintiff well knew to be untrue and without foundation in fact; for several months just preceding September 22, 1942, the defendant had been engaged in war

work for from twelve (12) to eighteen (18) hours a day; that defendant was in ill health and greatly worried over the welfare and whereabouts of his son who was in the military service; that as a cause of all the above, combined with the advanced age of the defendant, defendant suffered from such nervous and mental tremulations, disease and disorders that if defendant signed the purported agreement styled Exhibit "A" of the complaint that he was unable to comprehend the consequences of his act, or to understand what he was doing.

Fifth Defense

I.

If the defendant did sign the agreement styled Exhibit "A" of the complaint, the defendant is not in default of said agreement because it is specifically provided in paragraph Tenth of said Exhibit "A" of the complaint that * * * "But no default shall be deemed to have occurred unless the husband shall have failed to cure any such default within five (5) days after mailing of notice of such default to him by registered mail"; defendant alleges that no such notices of default as to any payments have ever at any time been mailed to defendant by registered mail, and that no such notices of default have been mailed at any time or at all to the defendant or otherwise communicated to him in any way whatever prior to the bringing of this action.

Sixth Defense

I.

If the defendant did execute the agreement styled Exhibit "A," of the complaint, defendant avers that the said agreement was without any consideration whatever and merely an illusory agreement under which all the benefits moved to the wife, and none whatever to the husband.

Seventh Defense

I.

If the defendant did execute the agreement styled Exhibit "A," of the complaint, defendant avers that said agreement is void under the laws and public policy of the State of New York, in that paragraph Eighth of said agreement in effect provides that unless the husband defaults in some part of the agreement the wife is not to have the right to bring an action for legal separation or for support or maintenance or for both, nor to have the right to ask for alimony and counsel fees and under the laws of the State of New York an agreement under which one party to a marriage purports to contract away all the rights and incidents of the marital status is void as against public policy and will not be enforced at the suit of either party thereto.

Eighth Defense

I.

That if the defendant did execute the agreement styled Exhibit "A" of the complaint, the defendant avers that said agreement was thrust upon him by counsel and that he did not read the document before signing it, nor was it read to him, that the plaintiff was informed by counsel that the document he was signing was merely some papers to obtain the dismissal of a legal action which had been brought against him by his wife; that the defendant did not understand the nature of the document; that defendant did not read the papers, nor were they read to him; that the defendant is a native of Ukrania, whence he came to this country in 1912; that in his native land the defendant had only five (5) years of education, and that the five (5) years were devoted mostly to learning to read and write the language of his native land; that after the defendant came to this country he went to night school only periodically for three (3) years; that the above education is all that the defendant ever had; that the defendant had not in 1942 mastered the English language, and a great deal of the things that were said to him he did not understand; that so far as ability to read and write the English language is concerned, the defendant was illiterate in 1942; that had the defendant understood the meaning of the agreement styled Exhibit "A" of the complaint, he would never

have executed the same, and that the execution by him of said agreement was the result of a gross mistake for which he was no way at fault.

Ninth Defense

I.

Defendant avers that he is not a resident of the State of California but is and has been continuously since March, 1947, a resident of the State of Florida and that the action has been brought in the wrong district and should be dismissed.

Wherefore, defendant prays that plaintiff take nothing by her complaint and that judgment be rendered for the defendant and for costs of suit and such other relief as to the court may seem just.

/s/ JERRY B. RISELEY,
Attorney for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

STIPULATION AMENDING COMPLAINT

It Is Hereby Stipulated and Agreed by and between the plaintiff and defendant, by their respective attorneys, that paragraph IX of the complaint heretofore filed in the above-entitled action be, and the same is hereby amended to read as follows:

“That plaintiff has duly performed all the terms and conditions of said agreement on her part, except as follows: Prior to April 1, 1947, defendant notified plaintiff in writing that on and after said date defendant would refuse to make any further payments to plaintiff (including those hereinbefore mentioned) pursuant to the terms of said agreement; that said agreement was unconscionable and invalid; that defendant would no longer abide by or perform the terms of said agreement on his part; and he thereupon completely repudiated said agreement. That by reason of the matters hereinbefore alleged, and by reason of the complete repudiation of said agreement by defendant as aforesaid, and his avowed and announced refusal further to perform the same, no notice or notices of default or demand for performance have been sent by plaintiff to defendant by registered mail, as provided in paragraph ‘Tenth’ of said agreement. By reason of defendant’s conduct aforesaid, the sending of such notice or notices was rendered unnecessary, useless and futile and was waived by the defendant.”

It Is Further Stipulated and Agreed that any other or further service or notice of such amendment or amended pleading be dispensed with.

It Is Further Stipulated and Agreed that the allegations contained in paragraph IX as herein amended be deemed denied by the defendant for all purposes of pleading; and that filing of any other or further answer or pleading by the defendant shall be dispensed with.

Dated: April 1, 1949.

/s/ DANIEL A. WEBER,
Attorney for Plaintiff.

L. J. STYSKAL and
JERRY B. RISELEY,

By /s/ L. J. STYSKAL.
Attorneys for Defendant.

It is so ordered: Dated this 11th day of April, 1949.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed April 11, 1949.

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL
COMPLAINT

(Action for Money Upon
Written Contract)

Plaintiff, as and for her amended and supplemental complaint, complains and alleges:

I.

That plaintiff is and at all times herein mentioned was a citizen and resident of the State of New York.

II.

That defendant is a citizen of the State of California, and resides in the County of Los Angeles, California.

III.

That the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs; and that by reason of the foregoing, this Court has jurisdiction of this cause.

IV.

That on or about September 22, 1942, defendant and plaintiff, as husband and wife, respectively, entered into a written agreement of support and maintenance, a copy of which is annexed to the original complaint, marked "Exhibit A," and which is incorporated herein by reference.

V.

That said agreement provided, among other things, that defendant shall pay to plaintiff, during her lifetime (unless sooner terminated as provided in said agreement), the sum of Fifty Dollars (\$50.00) per week, as and for her sole support and maintenance.

VI.

That there became due and payable to plaintiff, under the terms of said agreement, the sum of \$50.00 per week for each and every week during the period of one hundred and forty-three weeks from April 9, 1947, to the date of the filing of this amended and supplemental complaint, making an aggregate sum of \$7,150.00.

VII.

That defendant has failed to make payment to plaintiff of the installments described in the preceding paragraph hereof, except that defendant has paid to plaintiff, on account thereof, the aggregate sum of \$970.00 in the amounts and upon the dates set forth in Exhibit B, which is hereto annexed and made a part hereof.

VIII.

That there is justly due and owing from defendant to plaintiff a balance in the sum of \$6,180.00, no part of which has been paid although duly demanded.

IX.

That plaintiff has duly performed all the terms and conditions of said agreement on her part, except as follows: Prior to April 1, 1947, defendant notified plaintiff in writing that on and after said date defendant would refuse to make any further payments to plaintiff (including those hereinbefore mentioned) pursuant to the terms of said agreement; that said agreement was unconscionable and invalid; that defendant would no longer abide by or perform the terms of said agreement on his part; and he thereupon completely repudiated said agreement. That by reason of the matters hereinbefore alleged, and by reason of the complete repudiation of said agreement by defendant as aforesaid, and his avowed and announced refusal further to perform the same, no notice or notices of default or demand for performance have been sent by plaintiff to defendant by registered mail, as provided in paragraph "Tenth" of said agreement. By reason of defendant's conduct aforesaid, the sending of such notice or notices was rendered unnecessary, useless and futile and was waived by the defendant.

Wherefore plaintiff prays judgment against defendant for the aggregate sum of \$6,180.00, with interest upon each of the said installments of \$50.00 from the respective due dates thereof; for her costs of suit; and for such other and further relief as may be proper.

/s/ DANIEL A. WEBER,
Attorney for Plaintiff.

EXHIBIT B

Schedule of Payments Made by Defendant

Date	Amount
April 9, 1947.....	\$ 20.00
April 14, 1947.....	20.00
April 18, 1947.....	20.00
April 29, 1947.....	20.00
May 15, 1947.....	20.00
May 26, 1947.....	20.00
June 12, 1947.....	20.00
June 24, 1947.....	30.00
July 14, 1947.....	50.00
August 23, 1947.....	50.00
September 4, 1947.....	50.00
October 8, 1947.....	50.00
November 24, 1947.....	50.00
December 23, 1947.....	50.00
January, 1948.....	50.00
February, 1948.....	50.00
March, 1948.....	50.00
April, 1948.....	50.00
May, 1948.....	50.00
June, 1948.....	50.00

July, 1948.....	50.00
August, 1948.....	50.00
September, 1948.....	50.00
October, 1948.....	50.00
<hr/>	
Total	\$970.00

Affidavit of Service by Mail attached.

Lodged January 16, 1950.

[Endorsed]: Filed January, 23, 1950.

[Title of District Court and Cause.]

STIPULATION—ANSWER TO COMPLAINT
TO BE DEEMED ANSWER TO AMENDED
AND SUPPLEMENTAL COMPLAINT

It Is Hereby Stipulated and Agreed by and between the plaintiff and defendant by their respective attorneys that the answer heretofore filed by the defendant to the complaint shall be deemed for all purposes in this action to be the answer to the amended and supplemental complaint of the plaintiff heretofore filed in this action;

It Is Further Stipulated and Agreed that an order

to the foregoing effect may be entered without further notice.

Dated January 27, 1950.

/s/ DANIEL A. WEBER,
Attorney for Plaintiff.

/s/ JERRY B. RISELEY,
Attorney for Defendant.

It Is So Ordered: Dated this 30 day of January, 1950.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed January 31, 1950.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL & NOTICE OF
MOTION FOR NEW TRIAL

To Alexandra Woynicz, also known as Alexandra Woynicz Sianozecki, Plaintiff, and to Daniel A. Weber, Esq., her attorney:

You Will Please Take Notice that defendant in the above matter hereby moves for a new trial. The hearing on this motion will be held at 10:00, Monday, April 3, 1950, in Court Room No. 4 of the above court, before Judge Charles C. Cavanah, or at such

other time and place as may be designated by the Court.

The grounds upon which a new trial is sought are as follows:

(1) Irregularity in the proceedings of the court and by adverse party by which defendant was prevented from having a fair trial.

(2) Accident and Surprise which ordinary prudence could not have guarded against.

(3) Insufficiency of the evidence to justify the decision.

(4) Error in law occurring at the trial.

The insufficiency of evidence complained of is as follows:

(a) That insufficient evidence was introduced to establish that the separation agreement sued upon was fair and reasonable at the time of its execution and obtained without fraud, duress, and overreaching on part of plaintiff.

(b) That evidence introduced by plaintiff was not sufficient to overcome evidence offered by defendant that defendant was mentally incompetent to execute the instrument at the time of execution.

(c) That the evidence introduced by plaintiff was not sufficient to overcome the evidence offered by defendant that defendant was of unsound mind at the time of execution of the agreement and remained of unsound mind until late in 1947.

(d) That the evidence introduced by plaintiff

was not sufficient to overcome the evidence offered by defendant that defendant did not understand the agreement at the time of its execution.

(e) That the evidence introduced by plaintiff was not sufficient to establish that this court had jurisdiction over the subject matter of the action.

(f) That the evidence introduced by plaintiff was not sufficient to overcome the statutory presumption of undue influence in transactions between husband and wife.

(g) That the evidence introduced by the plaintiff establishes that the agreement was void as contrary to good morals and public policy.

That the considering of evidence offered by plaintiff and the failure to consider and give any weight whatever to the evidence offered by defendant was an abuse of judicial discretion.

The motion shall be heard upon the pleadings and papers on file and upon the minutes of the court including the clerk's minutes and any notes and memoranda which may have been kept by the judge and also the reporter's transcript of his shorthand notes and upon the exhibits introduced into evidence including all depositions.

Dated March 15, 1950.

/s/ JERRY B. RISELEY,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 16, 1950.

[Title of District Court and Cause.]

MOTION BY DEFENDANT TO AMEND FINDINGS AND TO MAKE FINDINGS MORE CERTAIN AND OBJECTIONS TO FINDINGS & NOTICE OF MOTION

To Alexandra Woynicz, also known as Alexandra Woynicz Sianozecki, Plaintiff, and to Daniel A. Weber, Esq., her attorney:

You Will Please Take Notice that defendant in the above matter hereby moves that plaintiff be required to amend the proposed findings heretofore submitted to the court, and to make the findings more certain. The hearing on this motion will be held at 10:00 A.M., Monday, April 3, 1950, in Court Room No. 4 of the above court, before Judge Charles C. Cavanah, or at such other time and place as may be designated by the Court.

Defendant's objections to the findings are as follows:

(a) The findings submitted by plaintiff do not comply with the letter or intent of Rule 52, Federal Rules of Civil Procedure ". . . the Court shall find the facts specially and state separately its conclusions of law thereon . . ."

(b) The findings and conclusions submitted by plaintiff merely specify that each allegation of the plaintiff's complaint is true and that the defenses set up by defendant are without merit, making the find-

ings uncertain and unintelligible when viewed by themselves without reference to at least three other pleadings i.e. the amended and supplemental complaint, the complaint and the answer.

(c) As submitted the findings ignore and evade the most important contention of law made by the defendant i.e. that the agreement is void as contrary to public policy because paragraph VIII, thereof, viewed with the remainder of the agreement, and particularly paragraph IX, purports to mortgage away the jurisdiction of the courts and to hinder the right of the parties to judicial redress.

(d) The proposed findings make no finding upon the specific mental condition of the defendant, and avoid the question necessarily included in the defence offered by the defendant as to whether the defendant—said in the proposed findings to have been mentally competent—was, although perhaps not so insane as to have been totally without understanding, of an unsound mind at the time of the execution of the contract and at the times of all the weekly payments mentioned in paragraph IV of the findings, or as to whether defendant was, or was not, acting under any dillusions which under the circumstances might have tainted the agreement.

(e) It is not clear from the findings just what the import of paragraph IV of the findings—that the weekly payments were made during the four year & some months period “with knowledge of the agreement”—is, i.e. wether the court held that as

a matter of law the defendant, although he might have been of unsound mind at the time of execution of the instrument, did, by his subsequent conduct in making the payments, perhaps while in the same state of mind he was in when he signed the agreement, become estopped to deny the validity of the agreement, or whether he later recovered his capacity and ratified the agreement by making the payments.

(f) No findings is made, except by reference to the amended complaint, as to the effect, if any, of defendant's letter of rescission sent to plaintiff in 1947, although this letter is relied upon to excuse the plaintiff from serving notice of default—a condition precedent to suit according to the terms of the contract.

(g) No finding is made on the essential point to plaintiff's recovery in this case, i.e. was the agreement in all respects fair, reasonable, and just in view of all the circumstances of the parties at the time and entered into without coercion or exercise of undue influence and with full knowledge of all the circumstances, conditions and rights of the contracting parties.

This motion is intended to be a motion under Rule 52 (b) FRCP and will be made and heard upon the pleadings, papers, and briefs on file, and upon the minutes of the court including the clerk's minutes and any notes and memoranda which may have been kept by the judge and also the reporter's transcript

of his shorthand notes and upon the exhibits introduced into evidence including all depositions.

Dated March 16, 1950.

/s/ JERRY C. RISELEY,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 17, 1950.

At a stated term, to wit: The February Term, A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 24th day of March in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Title of Cause.]

MINUTE ORDER

(Motion for New Trial Denied)

For hearing (1) motion by defendant to amend findings and to make findings more certain and for hearing objections to findings and notice motion; (2) motion of defendant for new trial, pursuant to

notice filed March 16, 1950; Daniel A. Weber, Esq., appearing as counsel for plaintiff; Jerry B. Riseley, Esq., appearing as counsel for defendant.

On statement of Attorney Riseley, it is ordered that the findings of fact and conclusions of law, filed on March 20, 1950, are vacated in order that Attorney Riseley may object thereto.

Attorney Riseley argues objections to findings. Attorney Weber argues in support of findings. Court makes a statement and orders that objections to findings are overruled and findings settled as of this date and re-filed, and that judgment, heretofore filed, be re-filed as of this date.

At 10:57 A.M. Attorney Riseley argues motion for a new trial. Court makes a statement. Attorney Riseley reads deposition of J. Charles Zimmerman.

At 11:54 A.M. Court declares a recess to 2 P.M. At 2 P.M. court re-convenes herein and all being present as before, including counsel for both sides.

Attorney Riseley resumes reading from deposition of J. Chas. Zimmerman and reads from deposition of Jos. L. Simon. At 2:49 P.M. Attorney Riseley reads from deposition of Leonard Woynicz.

At 3:44 P.M. Attorney Weber argues to the Court. Attorney Riseley argues.

The Court makes a statement and orders motion for new trial denied.

At 3:54 P.M. Court declares a recess in this cause to March 27, 1950, 10 A.M., for further proceedings.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action having duly come on for trial on the 7th day of March, 1950, before Honorable Charles C. Cavanah, in courtroom No. 4 of this Court; and Daniel A. Weber, Esq., appearing as attorney for the plaintiff and Jerry B. Riseley, Esq., appearing as attorney for the defendant; and the parties having offered oral and documentary evidence with respect to the issues herein; the court does hereby make the following findings of fact and conclusions of law, constituting the decision of the court:

Findings of Fact

I.

That each and every allegation contained in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of plaintiff's amended and supplemental complaint herein, is true.

II.

That at the time of the execution of the agreement dated September 22, 1942, which agreement is specified in the amended and supplemental complaint, the defendant was mentally competent to enter into said agreement and fully understood and comprehended the nature and purpose of said transaction; that the same was entered into by the defendant

freely and voluntarily and that at the time of the execution thereof the defendant was not acting under any duress or other disability.

III.

That no fraud was practiced upon the defendant in respect to the execution of said agreement.

IV.

That between September 22, 1942, and March 7, 1947, the defendant made or caused to be made, weekly payments in the sum of \$50.00 pursuant to the provisions of said agreement, which payments were made by the defendant with knowledge of said agreement and its provisions and of the nature of said payments.

Conclusions of Law

I.

That the plaintiff is entitled to a judgment against the defendant in the sum of \$6,180.00 with appropriate interest.

II.

That the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth defenses set forth in the answer of the defendant are, and each of them is, without merit.

III.

That the plaintiff is entitled to her costs of suit herein.

Allowed: Dated, March 24th, 1950.

/s/ CHARLES C. CAVANAH,
United States District Judge.

3/24/50

Objections made to proposed Findings are hereby denied.

/s/ CHARLES C. CAVANAH,
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 24th, 1950.

[Endorsed]: Filed March 20, 1950.

In the District Court of the United States, Southern District of California, Central Division

No. 9324 PH

ALEXANDRA WOYNICZ, Also Known as
ALEXANDRA WOYNICZ SIANOZECKI,
Plaintiff,

vs.

LEONARD WOYNICZ, Also Known as LEONARD WOYNICZ SIANOZECKI,
Defendant.

JUDGMENT FOR PLAINTIFF AFTER TRIAL

The above-entitled action having duly come on for trial on the 7th day of March, 1950, before Honorable Charles C. Cavanah, in courtroom No. 4 of this court; and Daniel A. Weber appearing as attorney for the plaintiff and Jerry B. Riseley appearing as attorney for the defendant; and the parties having offered oral and documentary evidence with respect to the issues herein, and the court having duly made its findings of fact and conclusions of law;

Now, on motion of Daniel A. Weber, attorney for plaintiff;

It Is Hereby Adjudged and Decreed that plaintiff, Alexandra Woynicz, also known as Alexandra Woynicz Sianozecki, recover of the defendant Leonard Woynicz, also known as Leonard Woynicz Sianozecki, the sum of \$6,180.00, with interest in the sum of \$600.83; and that the plaintiff also re-

cover of the defendant her costs of suit herein which are taxed in the sum of \$86.41.

Dated, March 20th, 1950.

/s/ CHARLES C. CAVANAH,
United States District Judge.

Filed Mar. 20, 1950.

EDMUND L. SMITH,
Clerk.

By /s/ C. A. SIMMONS,
Deputy Clerk.

Filed Mar. 24, 1950.

EDMUND L. SMITH,
Clerk.

By /s/ C. A. SIMMONS,
Deputy Clerk.

Judgment entered Mar. 20, 1950.

Docketed Mar. 20, 1950.

Book 64, page 515.

EDMUND L. SMITH,
Clerk.

By /s/ C. A. SIMMONS,
Deputy Clerk.

Judgment entered Mar. 28, 1950.

Docketed Mar. 28, 1950.

Book 64, page 726.

EDMUND L. SMITH,
Clerk.

By /s/ C. A. SIMMONS,
Deputy Clerk.

Affidavit of Service by Mail attached.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

The defendant, Leonard Woynicz, also known as Leonard Woynicz Sianozecki, hereby appeals from the judgment and orders of the above Court, set forth below, to the United States Circuit Court of Appeals for the Ninth Circuit.

The judgment and orders appealed from are as follows:

1. Judgment for the plaintiff and against defendant entered in the above-entitled action on March 28, 1950, Judgment Book No. 64, Page 726.

2. Order denying Motion of Defendant to Amend Findings and to Make Findings More Certain made March 24, 1950.

3. Order denying Motion of Defendant for a New Trial, made March 24, 1950.

Dated April 17, 1950.

/s/ JERRY B. RISELEY,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 17, 1950.

In the United States District Court, Southern District of California, Central Division

No. 9324-PH-Civil

ALEXANDRA WOYNICZ, Also Known as
ALEXANDRA WOYNICZ SIANOZECKI,
Plaintiff,

vs.

LEONARD WOYNICZ, Also Known as LEONARD WOYNICZ SIANOZECKI,
Defendant.

Honorable Charles C. Cavanah, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff

DANIEL A. WEBER, ESQ.

For the Defendant:

JERRY B. RISELEY, ESQ.

Tuesday, March 7, 1950

The Clerk: The next case is No. 9324-PH, Civil, Alexandra Woynicz v. Leonard Woynicz. Our record shows that Daniel A. Weber is present and counsel for the plaintiff, and Jerry B. Riseley is present for the defendant.

Is Alexandra Woynicz in court?

Mr. Weber: No.

The Clerk: Is Leonard Woynicz in court?

Mr. Riseley: Yes.

Mr. Weber: She is a non-resident.

Does the court feel that a brief opening statement would be of service to the court?

The Court: Yes.

Mr. Weber: This is an action to recover installments under a separation agreement entered into between the plaintiff and the defendant. These parties were married upwards of 26 years, and in about the month of July or August, 1942, your Honor, the defendant's wife filed an action in the Supreme Court in New York for separation, and incident to that action she asked for temporary alimony and counsel fees as an incident to the separation.

During the pendency of that action protracted negotiations were entered into between the lawyers for the plaintiff in New York and the lawyer for the defendant in New York, [3*] culminating in the entry of a written separation agreement which is the basis of this action, and under that separation agreement the defendant agreed to pay the plaintiff the sum of \$50.00 a week for her support and maintenance. The written agreement also covers a number of other subjects, including a life interest to plaintiff's wife in the residence of the parties in the Borough of the Bronx, City of New York, and provides for certain other incidents of the marriage relation.

* Page numbering appearing at top of page of original Reporter's Transcript.

Thereafter, these \$50.00 a week installments were paid, without incident, for upwards of four years. He paid \$50.00 a week by check for approximately four years, without incident, and in the early part of 1947—I think it was in the month of January, 1947—the defendant went to Florida. After establishing a 90-day residence period in Florida he procured a divorce, served by publication. The plaintiff's wife did not appear in that action, nor was she personally served. Thereafter and in the month of March, 1947—this is approximately almost five years—four and one-half years after the separation agreement was signed, a letter of repudiation was sent by the Florida attorneys for the defendant, advising the plaintiff that thenceforth they were not going to adhere to the separation agreement; that it was inequitable in that it made no provision for changed circumstances of the parties, and so on.

This action is brought to recover \$6,180, representing the accrued installments of \$50.00 a week which the defendant [4] has failed to pay, \$6,180.

The big issue here is whether or not the defendant, at the time he executed the agreement, had the mental competence to understand what he was signing, and whether or not duress was practiced upon him chargeable to the plaintiff.

We submit that, as a matter of law, having made payments under this separation agreement for upwards of four years, the defendant has waived, as a matter of law, any right to attack the agreement by reason of any alleged disability inherent

in its inception, assuming such to be the fact.

We have the authorities to the effect that where one acts under an agreement and evinces his awareness of its validity, or acts upon it as though it were a valid and subsisting contract, as a matter of law he cannot sit by in silence and, at some future or later date, come in and claim that the agreement was procured originally by duress or mental incompetence.

The Court: Does the defendant wish to make any opening statement at this time? You do not have to unless you want to.

Mr. Riseley: If it please the court, I will defer my opening statement until the plaintiff closes.

The Court: You may proceed. [5]

LEONARD WOYNICZ

(Also known as Leonard Woynicz Sianozecki.)

the defendant herein, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Leonard Woynicz Sianozecki.

The Clerk: Sianozecki, is that your last name?

The Witness: Yes, Sianozecki.

The Clerk: The last name of the defendant is Sianozecki.

The Court: You may proceed.

Mr. Weber: The prevailing pleading, your Honor, is the Amended and Supplemental Complaint. We brought the installments up to date in that amended pleading.

(Testimony of Leonard Woynicz.)

Direct Examination

By Mr. Weber:

Q. Where do you live, Mr. Woynicz?

A. At present, 232 West Imperial Highway.

Q. Were you married to the plaintiff in this action? A. Yes.

Q. When did you marry the plaintiff?

A. In December, 1916.

Q. She resides at 2929 Wellman Avenue, Bronx?

A. Yes, sir.

Q. That is in the City of New York?

A. Bronx. [6]

Q. Mr. Woynicz, in July or August of 1942 did the plaintiff file an action against you in the Supreme Court of the State of New York, Bronx County, for a separation? A. Yes.

Q. And after the filing of that action were there negotiations involving a settlement agreement entered into? A. Yes.

Q. I show you a document, Mr. Woynicz, and ask you whether or not this bears your signature?

A. Yes, sir.

Q. And that is the separation agreement that was signed at that time? A. Yes.

Mr. Weber: I offer that in evidence.

The Court: Admitted.

The Clerk: That will be Plaintiff's Exhibit No. 1 into evidence.

(Testimony of Leonard Woynicz.)

PLAINTIFF'S EXHIBIT No. 1

This Agreement made this 22nd day of September, 1942, between Alexandra Woynicz Sianozecki, residing at 2929 Wellman Avenue, Borough of Bronx, City and State of New York, hereinafter referred to as the "Wife," and Leonard Woynicz Sianozecki, residing at 2929 Wellman Ave. in the Borough of Bronx, City and State of New York, hereinafter referred to as the "Husband."

Witnesseth:

Whereas, the parties married on or about the 26th day of December, 1916, in the City of New York, State of New York; and

Whereas, there is one minor child born of said marriage, namely: Robert, who is now about seventeen (17) years of age, hereinafter referred to as "Robert"; and

Whereas, unhappy differences have arisen between the Husband and Wife, as a result of which they now are living separate and apart from each other; and

Whereas, an action is now pending in the Supreme Court of the State of New York in and for the County of Bronx wherein the Wife is plaintiff and the Husband is defendant, and wherein the Wife prays for a judgment and decree of separa-

(Testimony of Leonard Woynicz.)

Plaintiff's Exhibit No. 1—(Continued)

tion, such action having been commenced on or about the 4th day of August, 1942; and

Whereas, both the Husband and Wife have been fully, separately and independently advised of their legal rights and obligations by counsel of their own selection; and

Whereas, the Wife wishes to discontinue and terminate the aforementioned action; and

Whereas, it is the intention of the parties to continue to live separate and apart forever, and in view of their irreconcilable estrangement the Husband desires to make provisions for the support and maintenance of the Wife, and for the custody, support and maintenance and education of Robert;

Now, Therefore, in consideration of the premises and the mutual promises and undertakings herein contained, the parties agree:

First

This agreement shall take effect as of August 23rd, 1942, and continue for the natural lives of both parties, unless previously terminated by the occurrence of any one or more of the following:

- a. The death of the Wife.
- b. The remarriage of the Wife.
- c. The granting of a decree of divorce in favor of the Husband against the Wife by a

(Testimony of Leonard Woynicz.)

Plaintiff's Exhibit No. 1—(Continued)

Court of competent jurisdiction in the State of New York provided the granting of such decree is based on the ground that the Wife is living in open and notorious adulterous relations.

d. The repudiation of this agreement by consent of the parties provided said repudiation is in writing and duly signed and acknowledged by each of the parties hereto.

e. The death of the Husband, but nothing herein contained shall be deemed to relieve the estate of the Husband from any obligation incurred hereunder by the Husband prior to his death.

Second

From the date hereof the parties may and shall continue to live separate and apart for the rest of their natural lives and each shall be free from interference, authority and control, direct or indirect, by the other as fully as if sole and unmarried. Each may, for his or her separate use and benefit, engage in any employment, business or profession which he or she may deem advisable. Each may reside at such place or places as he or she may select.

Third

The wife shall own, have and enjoy independently of any claim or right of the Husband, all

(Testimony of Leonard Woynicz.)

Plaintiff's Exhibit No. 1—(Continued)

silverware, pictures, portraits, books, household furniture, china, glassware, rugs, and other household effects of every kind and description now located in the top floor apartment at 2929 Wellman Avenue, Borough of Bronx, City and State of New York, and the garden tools and equipment now located at the aforesaid premises, and also all wearing apparel, personal ornaments, and other personal property belonging to the Wife and now in her possession, or held by her, or which shall hereafter belong or come to her.

Fourth

The Husband shall, within six (6) weeks from date hereof, remove from the premises mentioned in the preceding paragraph, all of his personal tools, books and wearing apparel wherever the same may be located.

Fifth

The parties have carefully weighed the question of the custody of Robert. In doing so they have been guided solely by considerations touching upon Robert's welfare. They are convinced that the following disposition will be for the best interests of Robert:

a. The Husband shall have sole custody, control and education of Robert. He shall be responsible and liable for his adequate sup-

(Testimony of Leonard Woynicz.)

Plaintiff's Exhibit No. 1—(Continued)

port, maintenance and education consistent with his financial means, environment, and mode of living.

b. Should Robert desire to live or visit with the Wife, at any time or times hereafter, the Husband shall not prevent the fulfillment of said desire or desires, and during Robert's said visits or living with the Wife, the Husband shall remain responsible and liable for his adequate support, maintenance and education consistent with his financial condition, environment and mode of living.

Sixth

So long as the Wife shall fully keep, observe and perform the covenants and conditions to be kept, observed and performed by her under this agreement the husband shall pay to the Wife, for her sole support and maintenance, the sum of Fifty (\$50.00) Dollars a week, on the first day of each and every week commencing with August 23rd, 1942, during her natural life, unless this agreement is earlier terminated as herein provided.

Seventh

In consideration of the provisions herein made for her, the Wife has simultaneously herewith withdrawn the action for separation which she has

(Testimony of Leonard Woynicz.)

Plaintiff's Exhibit No. 1—(Continued)

heretofore commenced against the Husband in the Supreme Court of the State of New York, County of Bronx; and she has likewise withdrawn the motion made in such action for alimony and counsel fees. The counsel fees of the Wife, amounting to \$350.00 have been paid simultaneously herewith by the Husband to the Wife's attorney, Jack Klaw, Esq., of 521 Fifth Avenue, New York City, who has accepted the same in full satisfaction as to the Husband's liability for the services rendered by him in connection with the preparation of this agreement and also in connection with the Wife's aforesaid separation action.

Eighth

If the Husband defaults in the due performance of any of the terms, conditions, and covenants of this agreement on his part to be performed, the Wife shall have the right to bring an action either for a legal separation or for support and maintenance, or for both, and in any such action she shall have the right to ask for and obtain temporary and permanent alimony and counsel fees.

Ninth

Unless terminated as in paragraph "First" aforesaid, this agreement shall survive any order for payment of alimony, temporary or permanent, which may be made in any action which hereafter may be instituted between the parties for separation or divorce, and/or any interlocutory or final

(Testimony of Leonard Woynicz.)

Plaintiff's Exhibit No. 1—(Continued)

judgment or decree in such action granting or denying such alimony, and//or any order modifying such order, judgment or decree in such action, and this agreement shall not be merged in any of the aforementioned orders, judgments or decrees, but shall survive the same.

Tenth

The payments required to be made hereunder by the Husband to the Wife shall be made by money order or good check and shall be sent by mail to the Wife directed to her address above indicated. The Wife may from time to time specify other addresses to which said payments shall be mailed. The Husband shall not receive any credit for any payments hereunder unless said payments shall have been actually received by the Wife. But no default shall be deemed to have occurred unless the Husband shall have failed to cure any such default within five days after the mailing of notice of such default to him by registered mail.

Eleventh

The Husband simultaneously herewith, does execute and deliver to the Wife, a deed to premises 2929 Wellman Avenue, Bronx, and the lots adjacent thereto now owned by the Husband, free and clear of any liens or claims, conveying to the Wife a life interest therein with remainder to the chil-

(Testimony of Leonard Woynicz.)

Plaintiff's Exhibit No. 1—(Continued)

dren of their marriage, as joint tenants with the right of survivorship. In the event that the taxes, assessments, water rates, water charges and premium for adequate fire insurance affecting said property are not paid when payable and if the same remain unpaid for more than ten (10) days after notice from the Husband in writing requesting the Wife to pay the same, the Husband shall have the right to pay the same and deduct from the weekly payments provided for in paragraph "Sixth" hereof, the sum of Ten (\$10) per week until he shall have been completely reimbursed for the payment so made by him.

In the event of any notice of violation or order or demand from any municipal, state or federal department as may effect the aforesaid premises, then the Wife agrees to remove or comply with the same within the reasonable time and upon her failure so to do, the Husband shall have the right to remove or comply with the same and shall have the right to deduct from the weekly payments provided in paragraph "Sixth" hereof, the sum of Ten (\$10) Dollars per week until he shall have been completely reimbursed for such payments.

Anything to the contrary notwithstanding, the Husband agrees that said life interest of the Wife shall survive any order, judgment or decree which may be made in any action which may hereafter be instituted between the parties for separation or

(Testimony of Leonard Woynicz.)

Plaintiff's Exhibit No. 1—(Continued)

divorce, except that the said life interest of the wife shall not survive the granting of a decree of divorce in favor of the Husband against the Wife by a court of competent jurisdiction in the State of New York provided the granting of such decree is based on the ground that the Wife is living in open and notorious adulterous relations.

Twelfth

This agreement shall enure to the benefit of, and shall be binding upon, the parties hereto, their heirs, executors, administrators, and assigns, and the obligations of the Husband hereunder incurred prior to his death shall survive his death, and shall be binding on his estate.

In Witness Whereof, the parties hereto have hereunto set their respective hands and seals this 22nd day of September, 1942.

/s/ ALEXANDRIA WOYNICZ
SIANOZECKI,
Wife.

/s/ LEONARD WOYNICZ
SIANOZECKI,
Husband.

(Testimony of Leonard Woynicz.)

Plaintiff's Exhibit No. 1—(Continued)

State of New York,
City of New York,
County of New York—ss.

On this 23rd day of September, 1942, before me personally came and appeared Alexandra Woynicz Sianozecki, to me known and known to me to be the individual described in, and who executed the foregoing agreement, and duly acknowledged to me that she executed the same.

/s/ JACK KLAW,
Notary.

Term Expires March 30, 1944.

State of New York,
City of New York,
County of New York—ss.

On this 22nd day of September, 1942, before me personally came and appeared Leonard Woynicz Sianozecki, to me known and known to me to be the individual described in, and who executed the foregoing agreement, and duly acknowledged to me that he executed the same.

/s/ JOSEPH L. SIMON,
Notary.

Commission Expires March 30, 1943.

[Endorsed]: Filed May 26, 1950.

(Testimony of Leonard Woynicz.)

Q. (By Mr. Weber): The separation action was thereafter dropped by your wife?

A. I didn't hear you.

Q. That separation action which she brought was thereafter dropped by your wife? A. Yes.

Q. Did you go to Florida in the early part of 1947, Mr. Woynicz? [7]

A. In January, 1947.

The Court: Speak out loud so we can hear you.

The Witness: Yes; January, 1947.

Q. (By Mr. Weber): And you made these \$50.00 a week payments under the separation agreement until you went to Florida?

A. Until May.

Q. 1947?

A. May, 1947, then I continued to pay \$50.00 a month.

Q. I show you a document, a letter dated March 3, 1947, written by the law firm of Bouvier, Helliwell & McCaul of Miami, Florida, and ask you whether or not they represented you at that time?

A. Yes, sir.

Q. And this letter was sent by that firm to the plaintiff with your consent? A. Yes.

Mr. Weber: I offer that into evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 2 into evidence.

(Testimony of Leonard Woynicz.)

PLAINTIFF'S EXHIBIT No. 2

Law Offices
Bouvier, Helliwell & McCaul
Langford Building
Miami, Florida

March 3, 1947

Registered
Return Receipt Requested

Mrs. Alexandra Woynicz
2929 Wellman Avenue
Bronx,
New York, N. Y.

Dear Mrs. Woynicz:

We have been retained by your husband, Mr. Leonard Woynicz, who is a permanent resident of the State of Florida, to represent him in a settlement of the problems presently existing between you.

Mr. Woynicz has informed us, and has given us satisfactory evidence, that he does not have the present or anticipated income or resources to continue payments to you at the rate stipulated under the alleged separation agreement between yourself and Mr. Woynicz dated September 22, 1942.

We have examined this agreement and it is our opinion that this agreement is unconscionable and inequitable in that it makes no provision for modi-

(Testimony of Leonard Woynicz.)

fication because of changed circumstances of the parties and attempts to preclude a court of competent jurisdiction in the place of residence of either party from making such modifications as right and justice might require.

Mr. Woynicz is, therefore, sending you payment due for the month of March 1947 and is thereafter discontinuing payments to you under said agreement on the grounds that said agreement is unconscionable and inequitable, was improperly procured and makes financial demands far beyond his present or anticipated means.

However, Mr. Woynicz is fully aware of his responsibility to you so long as you remain his wife and thereafter and has instructed us to advise you that he is willing to enter into negotiations for a new agreement providing for monthly payments to you or for other settlement, based upon his present and anticipated financial resources. If a lump sum settlement is effected, such settlement is, of course, to be in full settlement of all present, past and future claims which you may have against him. If the new agreement provides for regular payments for an indefinite period then and in that event the agreement must also provide that a court of competent jurisdiction will have power to modify these payments as the financial circumstances of the parties may change from time to time.

We again reiterate that Mr. Woynicz has every desire and willingness to meet any reasonable obligations he may have to you to contribute to your

(Testimony of Leonard Woynicz.)

support. However, he will not and cannot continue to perform under the alleged agreement in existence for the reasons above outlined. We, therefore, request that you at once advise us of your position in this matter so that we may commence negotiations with respect to working out an agreement which is fair and equitable to all parties concerned.

Very truly yours,

BOUVIER, HELLIWELL &
McCAUL,

/s/ PAUL L. E. HELLIWELL.

Received in Evidence March 7, 1950.

Mr. Weber: With the permission of the court, I would like to read into the record a question and answer contained in the deposition of this witness in respect to the payments made prior to the action.

The Court: Is the deposition identified at all?

Mr. Weber: Counsel and I are in accord that it may be read, that portion.

The Court: I did not hear you. You whisper across the table and I do not know what you are saying to each other.

Mr. Riseley: Show me that portion which you want to read, counsel.

Mr. Weber: Is it stipulated that Exhibit B attached to the complaint correctly sets forth all the

(Testimony of Leonard Woynicz.)

payments made by the defendant to the plaintiff from April 9, 1947, to the date of the filing of the Amended and Supplemental Complaint?

Mr. Riseley: Ask him.

Q. (By Mr. Weber): Mr. Woynicz, is this your signature (indicating)? A. Yes.

Q. I show you page 38 in that deposition, Mr. Woynicz, and ask you whether or not this refreshes your recollection that the installments listed upon Exhibit B of the Amended and Supplemental Complaint, or Exhibit B attached to the complaint, rather, correctly sets forth all of the payments which you made to the plaintiff under the agreement from April 9, 1947, to the date of the filing of the Amended and Supplemental Complaint?

A. This is not correct—oh, yes; you are right.

Q. Is that correct? A. Yes, sir. [9]

Mr. Weber: I offer in evidence by reference Exhibit B attached to the complaint in this action.

The Court: Any objection?

Mr. Riseley: No objection.

The Court: Admitted.

The Clerk: That will be Plaintiff's Exhibit No. 3 into evidence, which is Exhibit B attached to the complaint.

Mr. Weber: I offer into evidence at this time a stipulation entered into by counsel for both sides, authorizing the introduction of the deposition of

(Testimony of Leonard Woynicz.)

the plaintiff which I hold here, with the same force and effect as though it were taken on due notice.

The Court: Admitted.

The Clerk: Do you want that marked as an exhibit?

Mr. Weber: If I may.

The Clerk: The stipulation will be Plaintiff's Exhibit No. 4 into evidence.

PLAINTIFF'S EXHIBIT No. 4

In the District Court of the United States, Southern District of California, Central Division

No. 9324 PH

ALEXANDRA WOYNICZ, Also Known as
ALEXANDRA WOYNICZ SIANOZECKI,
Plaintiff,

vs.

LEONARD WOYNICZ, Also Known as LEON-
ARD WOYNICZ SIANOZECKI,
Defendant.

STIPULATION RE DEPOSITION
OF PLAINTIFF

It Is Hereby Stipulated and Agreed by and between the plaintiff and defendant by their respec-

(Testimony of Leonard Woynicz.)

tive attorneys that the deposition of the plaintiff, sworn to September 9, 1949, before Jack Klaw, Notary Public in and for the County of New York, State of New York, may be received in evidence upon the trial of this action with the same force and effect as though the same were taken upon due notice to the defendant.

Dated: December 22, 1949.

/s/ DANIEL A. WEBER,
Attorney for Plaintiff.

/s/ JERRY B. RISELEY,
Attorney for Defendant.

Received in Evidence March 7, 1950.

Mr. Weber: I offer into evidence the deposition of the plaintiff dated September 9, 1949.

The Court: If there is no objection, it is admitted.

The Clerk: The document entitled "Deposition of Alexandra Woynicz" will be Plaintiff's Exhibit No. 5 into evidence.

(Testimony of Leonard Woynicz.)

PLAINTIFF'S EXHIBIT No. 5

In the District Court of the United States, Southern District of California, Central Division

No. 9324 PH

ALEXANDRA WOYNICZ, Also Known as
ALEXANDRA WOYNICZ SIANOZECKI,
Plaintiff,

vs.

LEONARD WOYNICZ, Also Known as LEONARD WOYNICZ SIANOZECKI,
Defendant.

DEPOSITION OF ALEXANDRA WOYNICZ,
ALSO KNOWN AS ALEXANDRA WOYNICZ SIANOZECKI

State of New York,

County of New York—ss.

Alexandra Woynicz, also known as Alexandra Woynicz Sianozecki, being first duly sworn, deposes and says:

1. I am the plaintiff in the above action.
2. I state and affirm that I have never remarried, or entered into any marriage or marriage ceremony with any person since the execution of

(Testimony of Leonard Woynicz.)

the separation agreement described in the complaint in this action

/s/ ALEXANDRA WOYNICZ,
Also Known as ALEXANDRA WOYNICZ
SIANOZECKI.

Subscribed and sworn to before me this 9th day of September, 1949.

/s/ JACK KLAU,

Notary Public in and for said County and State.

My Commission Expires March 30, 1950.

Received in Evidence March 7, 1950.

Mr. Weber: No further questions.

The Court: Any cross-examination?

Mr. Riseley: I will examine him when he comes on in his [10] own behalf, your Honor.

The Court: I can't hear you.

Mr. Riseley: I will examine him further when the defendant commences his case in court.

The Court: Any questions now?

Mr. Riseley: No, your Honor.

The Court: You are excused. Call your next witness.

Mr. Weber: Plaintiff rests.

The Court: You are excused, yes.

Mr. Riseley: At this time I would like to make an opening statement and open my case, your Honor.

The Court: All right; go ahead.

Mr. Riseley: Your Honor, in this case there is a separation agreement that was entered into and now it has been attacked. One of the basic elements——

The Court: I have a note here. Let me see it a moment. We will take a recess of about two minutes. Another Judge wants to speak to me about a matter.

(Short recess.)

Mr. Riseley: Your Honor, one of the basic elements of a separation agreement is that it must be entered into between competent parties and it must be fair.

The Court: At the time it was executed.

Mr. Riseley: At the time it was executed.

The Court: That is correct. [11]

Mr. Riseley: In the case of incompetent parties we have two views of the law; one, that their contracts are void; and the other, that they are voidable.

In this case, whichever view you take, it does not make much difference.

The Court: Of course, if he was incompetent to make the contract, it is void. That is elementary. It is a question of fact whether he was incompetent. You need not waste time citing decisions on that. You learn that before you are admitted to the Bar.

Mr. Riseley: Then in this case, the simple question is: Was this man competent at the time he executed this contract?

The Court: That is your question.

Mr. Riseley: That is our question.

The Court: Very well; go ahead.

Mr. Riseley: We will proceed to put on our case to show his condition. Mr. Woynicz, take the stand, please.

The Clerk: You were heretofore sworn. Will you take the stand, please?

LEONARD WOYNICZ

(Also known as Leonard Woynicz Sianozecki) the defendant herein, called as a witness in his own behalf, having been previously sworn, was examined and testified as follows: [12]

Direct Examination

By Mr. Riseley:

Q. Where were you born, Mr. Woynicz?

A. At that time it was Russia. It is in Russia right now, too, but that belonged to Poland.

Q. And when were you born?

A. April 10, 1885.

Q. And when did you come to this country?

A. September 12, 1911.

Q. Could you speak English at that time?

A. When I came to America?

Q. Yes.

(Testimony of Leonard Woynicz.)

A. No; only Polish and Russian.

Q. When did you bring your wife to this country?

A. In 1916. In December she arrived, in 1916, from Russia.

Q. How much older are you than your wife?

A. Nine years, nine years difference. She was nine years younger than I. She was 24 or 23 and I was 33 or 32.

Q. Do you still have relatives in Europe?

A. Yes; I have in Poland, my brother.

The Court: Speak out loud.

The Witness: I have a brother in Poland now. I had another brother in Sibera.

Q. (By Mr. Riseley): In 1941 did you have——

A. He died in Sibera.

Q. When did you learn about that, in 1940?

A. In 1941.

Q. Would you tell the Judge what you felt when you learned of your brother's death?

A. Your Honor, my brother brought me here——

(Intermission for other court proceedings.)

The Court: Go ahead.

Mr. Weber: Would you repeat the question, please?

(Question read by the reporter.)

A. In the horrible way he died. He died in such a horrible way. Then, you know, in America when that case come and my wife——

(Testimony of Leonard Woynicz.)

The Court: Speak up and talk loud so the reporter can hear you.

A. When the case came to court where my wife sue me for separation, it was such injustice. It was everything was false——

Mr. Weber: Just a minute, just a minute.

The Witness: All accusations was false.

Mr. Weber: Just a moment, Mr. Woynicz. I believe the question was something in connection with the news of his brother's death in 1941.

The Witness: That comes altogether. That is my wife——

Mr. Weber: Mr. Woynicz, just a moment. [14]

Mr. Riseley: Yes. There is an objection here.

The Court: You are all talking at the same time. Try the case with some regularity. Read the question to him again.

Q. (By Mr. Riseley): Mr. Woynicz, will you tell the Judge what the effect was on you when you learned your brother had been killed in Siberia?

A. I was so depressed. It was really the best friend I had.

Q. Were you working at that time?

A. Yes; I been working for the New York Thread Grinding Corporation.

Q. Did you have a son who was in the service?

A. Yes, Leonard. He volunteered in 1940. I am not sure.

Q. In March, 1940, did you have an appendicitis trouble?

(Testimony of Leonard Woynicz.)

A. Yes. I was operated in 1941.

Q. And in June, 1941, did you have an operation? A. Yes.

Q. And what was the operation for?

A. Appendicitis.

Q. Were there any complications to that operation?

A. Yes. I had peritonitis, and then after that the incision opened. I had to wear the plate because my intestines would come out.

Q. In March, 1942, did you have another condition arising from that operation? [15]

A. Yes. I had operation to repair the hernia, I guess, and then 10 days later my gall bladder was removed.

Q. On May 13, 1942, the doctor gave you some advice as to where you should live, did he not?

A. I am mixed up. You asked me about the second operation?

Q. Where were you living from 1932 until early in 1942? Where did you live?

A. 1932, in 2929 Wellman Avenue.

Q. When did you move from Wellman Avenue?

A. I moved—I can't recall the date, but because my intestines used to come out the doctor forbid me to ride in the subway; so I moved to walking distance of the shop.

Q. On August 6, 1942, were you served with some papers?

(Testimony of Leonard Woynicz.)

A. I don't know now the date, but I was served with the summons. I don't recall the exact date.

Q. What was the effect on you when you got those papers?

A. Because all accusations was false I thought I would drop dead. I was working 16 hours a day, and they accused me that I was talking with the women.

Q. Your son was in the service at that time?

A. Yes, sir.

Q. Were you concerned about him?

A. Very much.

Q. Did you sleep well? [16]

A. I couldn't sleep that time.

Q. What would you do when you went to bed?

A. Well, sometimes lay and think what is it my wife is doing.

Q. Did you cry? A. Yes.

Q. Did you have any trouble with muscular trembling?

A. Yes. My stomach—I couldn't hold anything in the stomach.

Q. Did you have any trouble with losing things when you were working at the shop?

A. I have sometimes lose my way to the shop, and some people could talk to me and I couldn't even hear what they talking about. I was in charge that time of the heat treatment department, a very dangerous thing, and many times I was burn myself because I forget that you could not put any water in liquid fire.

(Testimony of Leonard Woynicz.)

Q. You say sometimes you would get lost walking to the shop? A. Yes.

Q. Tell us about that.

A. Well, I either didn't reach the shop or forget to look where I am and I have 14 or 15 blocks to walk.

Q. You had been familiar with the way there before?

A. Yes; I was walking there for quite a long time.

Q. Would you ever lose any of the parts that were given [17] you?

A. It is hard to tell you. I couldn't remember, my mind was such I forgot. I was told many times maybe I order something. Where is it? I don't even remember I order something.

Q. Did you ever think about death or talk about it?

A. I just talk to God that I be killed.

Q. Did you ever have any fears of insanity?

A. Well, I thought I was insane that time because I could not understand what was going on.

Q. What did you finally do with the papers that were served on you?

A. Well, I took the first ones to a lawyer, Mr. Small, and he told me he didn't handle those things. He wanted to hand it to somebody else. My partner recommended Mr. Zimmerman, so I had Mr. Zimmerman to handle the papers.

Q. Did you tell Mr. Zimmerman about your case? A. Yes.

(Testimony of Leonard Woynicz.)

Q. Did you ever have any discussion with Mr. Zimmerman about Moscow trials?

A. This come during the discussion. You see, he didn't want to take—I wanted to go to court because I was innocent. I believed the United States court will not persecute the fellow when he is not guilty. Well, on one way or the other, he didn't want to accept any witness. I had a hundred men working. I open the shop for them all day long until 8:00 o'clock in the evening. I told him they all will witness with me that I never even went to lunch downstairs. That is including Sundays and holidays. And he says, "You cannot do that." "The jury will believe them, and you pay it. You do it." And my friends the same thing. One friend was I helped him out and he was with me four years.

Mr. Weber: I dislike to interrupt, but I believe the question was: What conversation was had with Mr. Zimmerman.

A. And he refused all those statements, and I told him: "Here it looks the same thing with Moscow trial. One side can tell anything and the other side cannot bring any witnesses." He said, "Well, that is almost the same thing." He says, "No jury will accept the testimony of such a witness."

Q. (By Mr. Riseley): Did you talk about Moscow trials much?

A. Well, he refused. He says, "Here, it will be the same thing." He only wanted to accept testimony by my daughter who is present over there.

(Testimony of Leonard Woynicz.)

Whatever he asked her I don't know, but he told—he said, “In your own handwriting and you will sign that and I will accept her as a witness.” And some way I don't want my daughter to testify. I don't know. I wouldn't do it. I told her that is Moscow style. From that time on I just agreed to sign anything. I didn't care what I did.

Q. Do you recall one incident when your daughter was [19] in Mr. Zimmerman's office?

A. That is what I told you. She was there and he took testimony from her and requested her to sign her own handwriting against the mother. I thought no. Not matter what the mother was, I don't want the child to testify against the mother. I don't know what she told him. I wasn't there.

Q. Do you recall one incident when she was crying in his office?

Mr. Weber: Objected to as irrelevant.

A. Well, she could be crying——

Mr. Weber: Just a moment. Objected to as irrelevant.

The Court: Sustained.

Mr. Riseley: I offer to show, if the court please——

The Court: The court has ruled. Go ahead.

Mr. Riseley: I beg pardon?

The Court: The court has ruled. Go ahead.

Mr. Riseley: Yes, sir.

Q. Mr. Woynicz, during this period of August and September of 1942 did you have any pains?

(Testimony of Leonard Woynicz.)

A. Yes; I had the pains in the head and stomach, and the headache.

Q. And vomiting? A. No vomiting.

Q. Do you remember going to Mr. Zimmerman's office on September the 22nd, 1942? [20]

A. I don't recall the exact date.

Q. Do you remember of going to Mr. Zimmerman's office at the time the settlement agreement was signed?

A. Yes. Yes; I remember.

Q. Would you tell us what you remember about that day and how you felt that day?

A. Well, just before that day of that signing, my partners and my children went to my wife to stop her. I didn't want to break up the home. I want by any means to continue living together. But they all come with the same answer. No; she would not under any consideration. So I have nothing to live for and I sign it.

Q. Was the agreement read to you at that time?

A. Evidently it was read, but——

Q. Do you recall it being read to you?

A. My memory was so bad. Evidently. I wouldn't deny it probably was read.

Q. Did you understand it?

A. No; I did not, not all of it. I understand quite a few part of it. Some part of it I still do not understand.

Q. Did you ever tell anybody that you thought you would be better off if you were dead?

(Testimony of Leonard Woynicz.)

Mr. Weber: Objected to as incompetent.

The Court: Sustained.

Q. (By Mr. Riseley): Did you ever have any trouble [21] eating?

Mr. Weber: Objected to as irrelevant.

The Court: What is it you wish to show?

Mr. Riseley: To show the operative symptoms of the incompetency.

The Court: I cant' hear you. Speak out.

Mr. Riseley: To show the symptoms of incompetency, to lay the foundation for my expert testimony.

The Court: Very well, go ahead.

(Question read by the reporter.)

A. Yes. I couldn't hold it on my stomach. My stomach was so nervous I could not eat nothing.

Q. (By Mr. Riseley): Mr. Woynicz, you mentioned that you talked to Mr. Zimmerman about the Moscow trials. What was your impression of these Moscow trials and how did they fit into this picture here?

Mr. Weber: Objected to as irrelevant, incompetent and immaterial, also as to form.

The Court: Sustained.

Q. (By Mr. Riseley): Would you tell us what you said to Mr. Zimmerman about the Moscow trials?

The Witness: I didn't get that.

Q. Would you tell us what you said to Mr. Zimmerman about the Moscow trials?

(Testimony of Leonard Woynicz.)

Mr. Weber: I believe that has been asked and answered, [22] has it not?

Mr. Riseley: I think he mentioned it.

The Court: Well, go ahead. Let us hurry up here.

A. Well, just, you know, they had no chance to talk. I told him so. So they had to admit they hadn't had a chance. There was no talking. There was no chance for people. I say, here, it looks like here the same thing. I cannot bring any witness. I can't testify myself. And I said what I say was all false and the other part was all true.

Q. Did you understand Mr. Zimmerman to tell you that it would be a Moscow trial?

A. Well, I couldn't tell that, because my memory is very hazy as to that. But he just don't expect anything about it, or something like that.

Q. When the papers were first served on you did you call somebody up?

A. When the summons was served on me, I was really shocked so much I thought it was a joke. I called Mr. Klaw and asked him if that is a joke, because everything was false. He said, "No; it is no joke. It is all true what is said there."

Q. Were you under a doctor's care at this time?

A. Yes.

Q. Was the doctor prescribing for you?

A. First of all, he prescribed me to move near the shop [23] and wear the belt that was holding my hernia.

(Testimony of Leonard Woynicz.)

Q. Was he giving you any pills to make you sleep?

A. Yes; because I could not sleep. He prescribed me something, if I remember that. I couldn't repeat it only once, the medicine was so strong that I could only get it only once.

Q. Did he prescribe once for you or more than once?

A. Well, he repeat again. He gave me another prescription.

Q. Did you think about your father during that time?

A. Yes; I was thinking a lot. My father did suicide when I was 7 years old. Maybe that is shame to think about committing suicide when you have children. But I did not commit, because I knew it was a mistake my father did. I did not want to leave the children with the same feeling that I had to my father.

Q. Now, in the presence of Mr. Simon—who is Mr. Simon?

A. I really don't know. He had a room in the same floor with Mr. Zimmerman. If he was partner or not I don't know. I call on him and he notarized the signature when I signed the papers. I think he was. He was partner at that time of Mr. Zimmerman, but he had nothing to do at all with the case. He just spoke of a few things, but we never discussed with him.

Q. Was he present at conferences between you and Mr. [24] Zimmerman?

A. No.

(Testimony of Leonard Woynicz.)

Q. Any of them?

A. Maybe the last one before I signed, because he was present to notarize the thing. Probably he was at that time, but no discussion with him. The discussion was with Mr. Zimmerman. They had absolutely separate rooms, closed door, and I spoke to him a few times just. I even did not know Simon's name until you recall me. I didn't know what his name was.

Q. Did Mr. Zimmerman tell you that if you went to court you would lose?

A. He said that you have no right to stand on something like—I cannot recall the exact words. He said it is no use to go, you lose it.

Q. Did you have any difficulty in understanding what Mr. Zimmerman said to you when he was explaining things to you?

A. Well, many times, because at that time I had bad English, now, too, but at that time it was absolutely due to mental condition, many times I couldn't understand what he was talking about. So he repeat me and repeat more or less I had to agree all the time.

Q. What is your native tongue? A. Polish.

Q. Does Mr. Zimmerman speak Polish? [25]

A. No. I never even asked him. Probably he knows. I never tried to speak it to him in Polish.

Q. Did you ever have any other lapses of memory?

(Testimony of Leonard Woynicz.)

A. Many times, but because of that I don't remember things what happened.

Q. Could you give us some examples of things that you did?

A. I know that many times a customer come and ask me something and I don't recall, to bring him tools or something. Then he comes in and I don't know why he come for, and I was ashamed to go back and ask what he wanted. I was ashamed.

Q. Did you ever experience any feverish feeling?

A. I was shivering all the time. That is what the doctor prescribe me some medicine what quiet me down.

Q. Did you understand the paper you signed that day in Mr. Zimmerman's office?

A. I still don't understand quite a few things in that paper.

Q. In April, 1943, were you still under a doctor's care? Did you have an operation?

A. Yes. I had two operations. I answered before.

Q. Tell us what you had.

A. I couldn't understand it any more. You see, there was so much coming out——

Mr. Weber: Just a moment. This is objected to. It is [26] about a year after the execution of the agreement.

The Witness: It was six months after, that was.

The Court: Why go into it so late after the execution of this agreement?

(Testimony of Leonard Woynicz.)

Mr. Riseley: Well, in proving insanity you can prove things that happened before or conditions that happened afterward to relate back. That is one point.

And the second point, he has introduced into evidence our letter repudiating the agreement, disaffirming the agreement of 1947. And until he disaffirmed the agreement, until his recovery in 1947, his mental condition was substantially the same. And then he went to Florida on the doctor's orders and began to recover his senses, and went to his attorneys down there and they disaffirmed the agreement on the ground that it was improperly procured, although admitting, as the letter says, that he was still obligated to support the woman who was his wife. And then after that, he paid her \$50.00 a month instead of \$50.00 a week as he had been under the agreement. And they have introduced the letter of 1947, and counsel in his opening statement suggested that maybe by acting under this agreement, even though it had been improperly procured while the man was incompetent, that he might have ratified it, I guess, by making the payments under it, might have admitted it was good.

The Court: Well, go ahead. [27]

Q. (By Mr. Riseley): You had an operation in April, 1943?

A. Yes; April, whatever date it was. Then 10 days later I was operated on for gall bladder.

Q. And you were under the doctor's care?

(Testimony of Leonard Woynicz.)

A. Dr. Bogatka. Dr. Anthony Bogatka.

Q. Then you were under the doctor's care from September the 22nd, 1942, when the agreement was signed, until you went to Florida? A. Yes.

Q. And you were advised by a doctor to give up your work and go to Florida?

A. Yes. Well, the work was done——

The Court: Speak out, speak out.

A. The work was finished. The shop was out entirely. One partner died. He had a heart stroke. And we just dissolved entirely in December, 1946. At that time the doctor said I was a very sick man that time, and he told me to go to Florida to recuperate.

Q. Was your mental condition about the same during this entire period from September, 1942, until you went to Florida early in 1947?

A. That is right. I had the two doctors there and they cured me up. I couldn't walk, I couldn't move my arms or nothing. But I say I was really cured after two years in [28] Florida. I was absolutely like another born.

Q. Prior to 1942, when you signed this agreement, I refer your attention to an incident that happened at Camp Upton. Would you tell the Court about that?

A. Well, our relations——

Mr. Weber: Is this relating to the mental capacity, Mr. Riseley?

(Testimony of Leonard Woynicz.)

Mr. Riseley: Yes. It is one of the outward forces that pressed in on him.

A. My boy was in Camp Upton and he is supposed to be shipped next week. We come, all family, all friends came there. We came there and was allowed to visit. We wanted to go all together to tell him good-bye and cheer him up. My wife refused absolutely to go. My son, my daughter, my niece, my nephew, and she says she will go. There was two friends worked there. She says she will go. Their names are Lucy and Helen. She says she will go to see boy with them. When we came to Camp Upton we spend all day long, waiting, and she didn't show up. We come home. She was home, and ask her, "Why you didn't come to see Leonard? Why didn't you see him? He will be shipped next week." "That is my business." That is all she said on this. I see there is no use. I am not the judge to condemn her or not, but she was not a mother that time.

Mr. Weber: I dislike to interrupt, but I see absolutely [29] no relevance to any issues in this action between that narrative and the installments due under the separation agreement. I asked Mr. Riseley whether this had any connection with any issue of mental competency. He said it did, but obviously we are going far afield.

The Witness: It just made me crazy.

The Court: What have you got to say to that?

Mr. Riseley: I will submit, your Honor, that on

(Testimony of Leonard Woynicz.)

this issue almost everything that happens to a man or everything that a man thinks is relevant, because it either shows that he was competent or that he was incompetent. I am quoting Dr. Wigmore on the subject. I do not believe that it is very far afield. I think I have covered considerable ground since I have started here less than a half hour ago. He has not gone very far afield. This, as he was just getting on to say, was the emotional effect upon him of this Camp Upton incident.

The Court: Go ahead.

The Witness: That upset me so much because that was our first son. I was in army myself. I know what the soldier is; I know what the danger is ahead of him. And she, even no matter what was, she should go and see him. That made me think in the mind that the mother could do such a thing to her son.

The Court: Take a recess until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day, Tuesday, March 7, 1950.) [30]

Los Angeles, California, Tuesday, March 7, 1950

2:00 P.M.

LEONARD WOYNICZ

(Also known as Leonard Woynicz Sianozecki)
recalled.

Direct Examination
(Resumed)

By Mr. Riseley:

Q. Directing your attention to November, 1942, Mr. Woynicz, did you have an additional health problem at that time?

A. Yes. I had a first attack of gall bladder. It was so severe that we had to call the doctor at night. He come about 2:00 o'clock at night. And then after treatments, you know, for a week or so, it subsided, but finally I had to go under an operation.

Q. Directing your attention to around September 22, 1942, in that period in there were you concerned with trains in any way?

A. I don't get you.

Q. With trains, railroad trains.

A. Well, traveling to work.

Q. Would you tell the Judge in what way you thought about the trains?

A. Well, I would be ashamed to tell, but I hoped the train would kill me and I would be done with everything.

Q. On that line did you consider any other methods, Mr. Woynicz? [31]

A. In the Russian Army, in the demolition squad

(Testimony of Leonard Woynicz.)

—I was in the Russian Army with the demolition squad and I saw what the effects, you know, of dynamite came to. And so I considered if I would have peace if I committed suicide that way, and it would be no trouble to bury me no more. I would be disintegrated entirely.

Mr. Riseley: Cross-examine.

The Court: How old are you?

The Witness: 65, your Honor.

The Court: 65. How old were you when you went into the army? Where were you when you went into the army?

The Witness: In the Turkish Army, Central Asia, four and a half years I was.

The Court: How many years were you in the army?

The Witness: Four and one-half years, your Honor.

The Court: How many?

The Witness: Four and one-half years in the Turkish war, the hottest place in the world.

The Court: Did you go through the first world war with the army?

The Witness: No; I was not. I was working and I was just to be called.

The Court: In the first world war?

The Witness: Yes. I was working. I just was to be called. I was married this time. [32]

The Court: You did not serve any in the first or second world wars?

The Witness: No.

(Testimony of Leonard Woynicz.)

Cross-Examination

By Mr. Weber:

Q. Mr. Woynicz, you became president of the New York Thread Manufacturing Corporation in 1940? A. Yes, sir.

Q. And you also became the general manager of that company at that time? A. Yes.

Q. And you remained the president of that corporation continuously until December, 1946?

A. Right.

Q. And general manager? A. Yes.

Q. How many people were working for you around September of 1942?

A. About a hundred and fifty or one hundred and sixty somewhere.

Q. At that time did you sign checks for the corporation? A. Yes; I did.

Q. Did you also sign the contracts that the Government entered into with that corporation?

A. Not always. [33]

Q. Yours was one of the signatures that was customarily affixed to contracts?

A. Yes. The secretary signed it.

Q. And you signed as president?

A. Not only very important.

Q. The important contracts that the Government had with the corporation you signed as president?

A. That is right.

Q. Mr. Woynicz, you were going to your place of business every day? A. Yes.

(Testimony of Leonard Woynicz.)

Q. You were supervising activities in the shop?

A. Yes.

Q. Giving instructions to the help?

A. Before. Not during that time, because when we start opening——

Q. You engaged in conferences with some of your associates about contracts that the Government was offering to the corporation?

A. Only in the mechanical.

Q. You engaged in conferences with Mr. Barudin in that respect? A. That is correct.

Q. As to how to make certain items?

A. Yes, sir. [34]

Q. When the papers were served on you in this action that your wife brought, you knew that she was suing you, did you not? A. Right.

Q. You knew that she was suing for separation?

A. Yes.

Q. You knew that she was asking you for temporary alimony? A. Yes.

Q. You knew that she was asking you for counsel fees? A. Yes, sir.

Q. And after you telephoned Mr. Klaw, the attorney for your wife in that action, you went to see an attorney by the name of Mr. Small, is that right? A. That is right.

Q. And he said he did not handle that kind of a case? A. Yes.

Q. And your partner, Mr. Barudin, was it, recommended you go to Judge J. Charles Zimmerman, is that right? A. Right.

Q. He was then a judge of the City Court of

(Testimony of Leonard Woynicz.)

Long Beach, New York?

A. I don't know what he was.

Q. And you went to see Mr. Zimmerman after your partner recommended him? [35]

A. That is right.

Q. When you went to Mr. Zimmerman's office did he tell you what the case was about?

A. Yes.

Q. He told you your wife was suing you for separation? A. Correct.

Q. He told you that your wife wanted alimony?

A. Yes.

Q. And you new that meant support, did you not? A. I don't get you.

Q. You knew that alimony meant support?

A. Yes.

Q. And you knew that your wife was asking for counsel fees? A. Yes.

Q. How many times did you go to Judge Zimmerman's office? A. I cannot recall.

Q. Five or six times would you say?

A. Not any more than that.

Q. In the course of those visits did you discuss a number of subjects involved in connection with your wife's lawsuit? A. Yes.

Q. Did you discuss with Judge Zimmerman the fact that your earnings were a matter of interest to the court in view of the fact that your wife was

(Testimony of Leonard Woynicz.)

asking for alimony? [36] A. I did not.

Q. Did you discuss with Mr. Zimmerman your earnings? A. No; we did not.

Q. Well, don't you remember that Mr. Zimmerman told you that in a case of alimony it was customary to determine the man's earnings before the court would award alimony? A. It was not.

Q. Mr. Woynicz, I direct your attention to your deposition in this case. You recall giving your testimony in a deposition? A. Yes.

Q. I direct your attention to page 35, beginning at line 7 to line 24, and ask you whether or not you gave the following answers in response to the following questions:

“Q. In your discussions with Mr. Zimmerman, do you remember Mr. Zimmerman discussing with you what your earnings were at that time?

“A. Possibly, maybe not. I don't recall.

“Q. Well, don't you remember Mr. Zimmerman telling you that on a motion for temporary alimony, the amount of money that you were making was a matter of importance? A. Yes.

“Q. And don't you remember you told Mr. Zimmerman how much money you were then earning as president of [37] the New York Thread Grinding Corporation? A. Possibly I did.

“Q. Now, did Mr. Zimmerman explain to you that on motions for temporary alimony, the more money the husband earned the more money the wife was entitled to?

(Testimony of Leonard Woynicz.)

“A. Yes, he frightened me plenty.

“Q. He told you that? A. Yes.”

Did you give those answers to those questions?

A. Yes; I did, but I repeat still that I did not discuss my earnings with him.

Q. In other words, when you testified in your deposition in the manner in which I just read to you, you were in error, is that your testimony?

A. Right here is what I said: “Possibly, maybe not.”

Q. Well, is it your recollection now, Mr. Woynicz?

A. My recollection was so hazy, I was in haze so much and the question was asked when I still don’t understand the next question.

Q. You recall the occasion when you went up to Judge Zimmerman’s office, do you not?

A. Yes.

Q. Do you recall discussing with him any other subjects that were connected with your wife’s action? [38]

A. In what way? What is your question?

Q. I show you the contract that was signed, Mr. Woynicz, Plaintiff’s Exhibit 1 in this trial, and ask you whether or not it is not a fact that you discussed with Mr. Zimmerman the question of your wife’s request to visit your son Robert? A. Yes.

Q. And you discussed that with Judge Zimmerman, is that right? A. Yes; I did.

(Testimony of Leonard Woynicz.)

Q. And at the time you were presented with a copy of this agreement you told Judge Zimmerman, did you not, that you wanted that paragraph stricken out? A. Yes.

Q. And that you did not want your wife to visit your son Robert?

A. Yes. It was such a plain language.

Q. You asked Judge Zimmerman that that be stricken out, is that right? A. That is right.

Q. And pursuant to your request he struck that out? A. Yes.

Q. I ask you whether or not it is not a fact, Mr. Woynicz, that in those meetings with Mr. Zimmerman you also discussed with him the question of removing from the house at 2929 Wellman Avenue? Didn't you discuss that? [39] A. Yes.

Q. And didn't Judge Zimmerman tell you that you would be obliged or you would be required to remove from those premises? Is that right.

A. Yes.

Q. And don't you remember you told him that you objected to the length of time that the contract gave you?

A. It was very plainly understood that I could not make it.

Q. And didn't you tell Mr. Zimmerman that you wanted the contract changed to give you more time to remove from the premises?

A. That is right; because I objected. I can understand that.

(Testimony of Leonard Woynicz.)

Q. In your visits to Mr. Zimmerman's office didn't you also tell him that you wanted an opportunity to remove the tools that belonged to Robert?

A. Correct.

Q. And you insisted that some such provision be put in that agreement, is that right?

A. I think that was provided in that.

Q. You saw that. You recognize that that was in the agreement, is that right? A. Yes.

Q. And that was something that you wanted Robert to have? [40]

A. That is right. It was so plain understood in plain language I could understand that.

Q. Didn't you also discuss with Mr. Zimmerman the fact that you did not want the payments to go on forever? A. Yes; I did.

Q. And when you were presented with the first draft of the agreement, you told Mr. Zimmerman that you didn't see why you should have to pay forever? A. Yes.

Q. And you told him that in the event of your wife's death, you wanted a provision that your obligation to pay would end; isn't that so?

A. Not the wife's death, but my death.

Q. And you told that to Mr. Zimmerman?

A. I don't believe that was drafted. Zimmerman didn't draft anything. Mr. Klaw, maybe, drafted the agreement. Mr. Zimmerman didn't do anything.

Q. When you went to Mr. Zimmerman's office to

(Testimony of Leonard Woynicz.)

look at the draft, you noticed that that provision was in there, did you not?

A. Maybe yes, maybe no.

Q. Well, didn't you tell Mr. Zimmerman——

A. I was concerned right away what was there, when I asked for a change of Robert's provision to take his tools.

Q. Didn't you also discuss with Mr. Zimmerman what was [41] to happen in the event that your wife remarried?

A. Well, I understand that, that my alimony would cease at that time on my death.

Q. Would stop?

A. Yes. That is very simple.

Q. And you discussed that with Mr. Zimmerman before you signed the agreement. A. Yes.

Q. When you signed the agreement did you discuss with Mr. Zimmerman the sum of \$350?

A. Yes.

Q. What was that for?

A. That was for Mr. Klaw.

Q. That was counsel fees for your wife's lawyer?

A. Yes. That was very plainly told.

Q. And you knew what that was for?

A. Yes; I knew that.

Q. And you wrote out a check for that, is that right? A. Yes.

Q. And at the time you wrote the check you knew that the agreement provided that \$350 would have to be paid to Mr. Klaw?

(Testimony of Leonard Woynicz.)

A. That is right.

Q. I show you a check dated September 23, 1942, purporting to bear your signature, Mr. Woynicz, in the amount of [42] \$350, and ask you whether you wrote that check? A. Yes; I did.

Q. Was this check given in payment of the counsel fees for Mr. Klaw? A. Yes.

Mr. Weber: I offer this in evidence.

The Court: Admitted.

The Clerk: That will be Plaintiff's Exhibit No. 6 into evidence.

Q. (By Mr. Weber): I show you another check dated September 23, 1942, Mr. Woynicz, purporting to bear your signature, in the sum of \$150.00.

A. Yes.

Q. And ask you what that was for.

A. That was part of the alimony.

Q. Under the agreement?

A. Under the agreement.

Q. And that was to cover three installments of alimony due under the agreement, is that right?

A. Yes.

Q. And you knew what it was for at the time you signed that check? A. Naturally.

Q. I show you another check dated September 28—strike that.

I offer this check in the sum of \$150.00 into evidence. [43]

The Clerk: Admitted, your Honor?

The Court: Admitted.

(Testimony of Leonard Woynicz.)

The Clerk: That will be Plaintiffs' Exhibit No. 7 into evidence.

Q. (By Mr. Weber): I show you a check dated September 28, 1942, and ask you whether or not you drew that check? A. Yes; I did.

Q. And that was in payment of an installment of \$50.00 due under the separation agreement which came due at that time? A. Yes.

Mr. Weber: I offer that into evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 8 into evidence.

Q. (By Mr. Weber): I will just take one more check at random. I show you a check dated August 23, 1943, Mr. Woynicz, purporting to bear your signature and ask you whether you drew that check?

A. Yes, sir; I did.

Q. And is that check in payment of an installment of \$50.00 which became due under the agreement on that date? A. Yes.

Mr. Weber: I offer this into evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 9 into evidence.

Q. (By Mr. Weber): And at the time you drew that check [44] you knew what it was for?

A. Yes.

Q. I show you a batch of checks encased in a rubber band, Mr. Woynicz, and ask you whether or not all of these checks——

(Testimony of Leonard Woynicz.)

A. Yes; I did.

Q. —bear your signature? A. Right.

Q. And they were checks given by you to your wife in payment of installments coming due under the agreement, is that right? A. That is right.

Mr. Weber: I offer them as one exhibit.

Mr. Riseley: Just a moment, counsel. Some of those checks in there are dated after October, 1947.

Mr. Weber: Those are the ones we have in a separate bundle there.

Mr. Riseley: Is it stipulated that there is no check in here dated after March, 1947?

Mr. Weber: I will accept that stipulation.

The Court: Very well.

Mr. Weber: May the record show that these come from the attorney for the defendant? I accept that stipulation.

The Court: Very well.

Mr. Weber: That the exhibit which I now offer contains [45] no check dated as of a date subsequent to March, 1947?

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 10 into evidence, a group of checks.

Q. (By Mr. Weber): At the time you signed this agreement, Mr. Woynicz, do you recall Mr. Zimmerman was present? A. Yes.

Q. And Mr. Simon, his law associate, was also present?

(Testimony of Leonard Woynicz.)

A. At that time I didn't know what was his name, but he was.

Q. At any event he notarized your signature at the time you signed it, is that right? A. Yes.

Q. At the time of your visit to Mr. Zimmerman's office did you discuss with him the subject as to what was going to happen if times went bad?

A. Yes. May I tell something additional to that?

The Court: What?

The Witness: May I tell additional something to that question?

The Court: Yes; go ahead. Speak out loud.

The Witness: That was discussed at that time with him because I just could not understand how I could pay for life such an amount of money. And I asked Mr. Zimmerman to limit it. He said that is impossible; that there is only one way, only forever after agreement. And we agreed [46] that way, that if he is right, I will give him \$100.00 more; if not, he is supposed to give me back all my \$400. And I find out he was wrong.

Q. (By Mr. Weber): And in those meetings with Mr. Zimmerman didn't you discuss with him the fact that in view of the wartime earnings which you were making, the sum of \$50.00 a week—strike that. Didn't you discuss with him the fact that your earnings at that time were rather high?

A. Well, we didn't discuss that. We discuss only how much to pay.

Q. Didn't you discuss with him the fact that your

(Testimony of Leonard Woynicz.)

wife was to receive a life interest in the house at 2929 Wellman Avenue, Bronx?

A. Yes. But here is what was mistake.

Q. Did you discuss the fact that your wife wanted the life interest in that property?

A. Yes. But I thought the kids, when they would come from war, they would have a right to their house to live in it. And I know that when the kid come from war—he was five years in the war—three years he was there, and he had no room to live. I told him to go ahead and have one apartment, and then I find out he can't do that. I was sure to the last minute I have a right to occupy one apartment when he come from war. He deserved that. He was fighting for you, for me, for the whole United States. [47]

Q. I show you Plaintiff's Exhibit 1, Mr. Woynicz, and ask you whether or not the initials appearing on page 4 "L. W. S." are your initials?

A. Yes.

Q. Were those initials put on that page to indicate your approval of that change in the contract?

A. Right. It was such a plain thing.

Q. You were indicating your approval?

A. Yes; I did.

Q. That you wanted a change?

A. It was a plain thing to understand. I didn't understand the other things.

Q. I direct your attention to page 29 of your deposition, Mr. Woynicz, and ask you whether or

(Testimony of Leonard Woynicz.)

not you gave the following answers in reply to the following questions?

A. Which one?

Q. Beginning at line 3 and ending at line 8:

“Q. Do you recall any discussion with Mr. Zimmerman about what was to happen to the payments of \$50.00 a week in the event that your wife died?

“A. I think in that event I would stop payments.”

Mr. Riseley: There was no question.

Mr. Weber: Just a minute.

“Q. And Mr. Zimmerman explained that to you? A. Yes.” [48]

Q. Did you give those answers in reply to those questions at the time of your deposition?

A. Yes. I did not understand what you asked me for.

Q. Mr. Woynicz, would you——

A. Yes. I signed that. I signed it. But here, I put your correction. I put, when I corrected that thing, I put a question. There was no such question.

Q. Do you recall getting this deposition from Mr. Styskal? A. Yes; I signed it.

Q. You took it home with you? A. Yes.

Q. And you read it?

A. Yes. I put all the corrections there.

Q. I ask you whether or not all corrections appearing in this deposition were made by you in your handwriting? A. Yes.

(Testimony of Leonard Woynicz.)

Q. And that applies to every correction appearing in this deposition, is that right?

A. I put in the pencil.

Q. And you made these corrections in your own handwriting? A. Yes.

Q. And did you read this yourself or was Mr. Styskal present? [49]

A. No; I had it at home.

Q. Is this correction on page 11 also in your handwriting? A. Yes.

Mr. Weber: At this time I offer the entire deposition of the witness.

Mr. Riseley: I will object to the introduction of it on the ground it has never been filed with the clerk; and further, on the ground that the witness is here to testify and it should only be used for impeachment; and on the further ground of the irregular manner in which the deposition was corrected and handled after the deposition was taken. There was plenty of time for counsel to have filed this deposition and to have obtained the reporter's corrections, and signed a corrected deposition.

Mr. Weber: Are you stating that there are changes in that deposition made from the time it left Mr. Woynicz's hands?

Mr. Riseley: I am stating that the deposition is irregular and he has not explained these question marks that he made.

The Court: How was it taken? For whom was the deposition taken?

(Testimony of Leonard Woynicz.)

Mr. Weber: It was taken before a duly constituted reporter and it is duly certified in accordance with the Rules of this Court. The witness has signed it and the requisite certificates of the reporter are affixed, and the stipulation of [50] counsel is part of the record of the deposition.

The Court: What does the stipulation say?

Mr. Weber: That the deposition of the defendant may be taken as an adverse party. And the deposition is duly signed by the witness. He has made the corrections in his own hand.

The Court: When was that taken?

Mr. Weber: This was taken on the 28th of June, 1949.

Mr. Riseley: If I may point out to the Court, your Honor, at that time, although I was an attorney of record, I was not connected with this case.

The Court: If you are attorney of record, you are connected with it, if you are an attorney of record. If not, what are you doing on the record? Of course, you are connected with the case whenever your name appears in the record of the case.

Mr. Riseley: Then I might make the point that the attorneys of record at that time were L. J. Styskal and Jerry B. Riseley. In this deposition, for the defendant, it says "Anthony L. Styskal, Esq."

The Court: You said a moment ago you were attorney of record.

Mr. Riseley: Yes, sir.

(Testimony of Leonard Woynicz.)

The Court: What was done with this deposition? Why was it not filed with the clerk here and served? Was it served on the opposite party? [51]

Mr. Weber: No. The only reason for that was, associate counsel for the defendant, Mr. Styskal, gave it to me in order that I could conform my copy with respect to the corrections, and I made it available for Mr. Riseley before the opening of the trial for the same purpose. It was made available for the purpose of making corrections in my copy to correspond with those made by the witness in his handwriting. That was the only reason it came to my possession. It was done with the consent of Mr. Styskal, with the understanding that it was to be filed at the time of trial.

The Court: What understanding do you have reference to? Is that just among you attorneys?

Mr. Weber: Yes. There was just an informal understanding that I was to file it, and it was given to me, as I say, for the purpose of conforming my copy.

The Court: Why did you wait so long from June?

Mr. Weber: The actual signing of it took place long after that. The actual signing of it took place——

The Court: Taken before a reporter in this court, you say?

Mr. Weber: Taken before official court reporters Abkin and Newman.

(Testimony of Leonard Woynicz.)

The Court: And certified to be correct?

Mr. Weber: Certified to be correct. The certificate is part of the record. [52]

The Court: Did counsel stipulate that it could be taken in that way?

Mr. Weber: Yes.

The Court: Is that of record?

Mr. Weber: Yes, the stipulation of counsel.

The Court: What is it? Read it.

Mr. Weber (Reading): "It Is Hereby Stipulated and Agreed by and between the respective parties to the above-entitled action that the testimony of _____" —the name of the witness is omitted— "a witness on the part of the Plaintiff in said cause, be taken before David Newman, a Notary Public in and for the County of Los Angeles, State of California, on Tuesday, the 28th day of June, 1949, beginning at the hour of 2:00 o'clock p.m. thereof, at 208 S. Beverly Drive, in the City of Los Angeles, County of Los Angeles, State of California, and if not completed on said day it will be continued from day to day thereafter until completed. That said deposition and testimony, when taken, may be read and used in evidence in said cause on any trial thereof or proceeding therein, subject to the same objections and exceptions, as if the said witness were personally present, but without objection or exception to the time, place or [53] manner of taking the same, or to the form of the question, unless noted at the time."

(Testimony of Leonard Woynicz.)

That is the stipulation and it is signed by Daniel A. Weber, Attorney for Plaintiff, and Anthony L. Styskal, Attorney for the Defendant.

The Court: It will be admitted.

The Clerk: Plaintiff's Exhibit No. 11 into evidence, deposition.

PLAINTIFF'S EXHIBIT No. 11

[Deposition of Leonard Woynicz Sianozecki, taken on behalf of the Plaintiff, June 28, 1949. See pages 281 to 326 of this printed record.]

(Received in evidence March 7, 1950.)

Q. (By Mr. Weber): This Dr. Bogatka whom you mentioned, he has been your family doctor, has he not? A. Yes.

Q. He has been your doctor for many years?

A. Yes.

Q. And he is a general practitioner?

A. Yes. He is surgical doctor. He is Professor of Surgery in Bellevue Hospital in New York.

Mr. Weber: No further questions.

Redirect Examination

By Mr. Riseley:

Q. Showing you Plaintiff's Exhibit No. 11, the

(Testimony of Leonard Woynicz.)

deposition, Mr. Woynicz, page 29, line 5, two question marks in pencil. Did you put those question marks there? A. Yes; I did.

Q. Did you put them there at the time you purportedly corrected the deposition? [54]

A. Yes; because that was not in the agreement. I could not understand that time. That does not appear in the agreement whatever, the case of my wife's death.

Q. In other words, you did not agree with the interpretation placed on your answer by the reporter, is that right? A. Yes.

Q. On page 28 here, from lines 4 through 18, all these pencil marks and "It all not true" written across there in handwriting, and "No, no, no," written several times in between those lines, and "He never told," did you write that?

A. Yes; I did, because it was wrong. I don't think even the question was completed that way. I doubt very much, because I tried. There is my daughter. You can ask her. I tried to conciliate to the last minute. I want to reconcile. I want my home to be in the contract, so I asked him for that, but he refused to do it.

Q. In your discussion with Mr. Weber it was mentioned about the children would have a place to live when they got back from the war. Did Mr. Zimmerman tell you that?

Mr. Weber: Just a moment, now. I do not believe that is a proper question because the issue here

(Testimony of Leonard Woynicz.)

is not whether or not a certain provision was actually agreed upon or whether it was a valid term of agreement. The question was originally, on my interrogatories of the witness, as to what was discussed, to show the comprehension of the witness of the [55] substance of the negotiations then pending. Whether or not the agreement originally, or whether or not the provision in its final form is something to which he originally objected is not a matter of any consequence. The question is: What was the agreement as finally signed? And the purpose of my questioning was limited to the issue as to whether or not a certain subject was discussed, and this question on redirect is improper.

Mr. Riseley: Well, I would submit, your Honor, that the question is how much he understood, and not just what was discussed. It is what he understood.

The Court: Before the instrument was signed?

Mr. Riseley: Yes; what he understood to be the agreement.

Mr. Weber: For example, I might say or anybody seeking a separation agreement might say: "I originally objected to paying \$100.00 a week. I wanted a smaller amount." That would not be relevant as to whether or not a certain subject was discussed and that the witness knew the agreement involved a particular subject, and not a question whether or not in its original form he was willing to go for that kind of a deal. That would entail a re-

(Testimony of Leonard Woynicz.)

examination of all the negotiations from the standpoint to see whether or not that is what he wanted.

By the same token, we can show that the plaintiff asked for much more and finally consented to \$50.00 as a means of [56] accomplishing this settlement; and it is no more competent for him to show that originally he did not want to pay X dollars, as it would be for us to show that we asked for a much larger sum.

The Court: Objection sustained.

Mr. Riseley: No further questions.

Mr. Weber: Just one question, Mr. Woynicz.

Recross-Examination

By Mr. Weber:

Q. After you took this deposition home to read it and made corrections, you had this notarized before your own attorney, did you not, Mr. Anthony L. Styskal? A. Yes.

Q. And he was your attorney at that time?

A. Yes.

Q. In this action?

A. Yes. He knew nothing about the case, anyway.

The Court: You have answered the question. Go ahead. He said he was; so go ahead.

Mr. Weber: That is all.

The Court: You are excused.

EDMUND GEORGE TANNER

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Your full name? [57]

The Witness: Edmund George Tanner.

Direct Examination

By Mr. Riseley:

Q. Mr. Tanner, did you know the defendant, Leonard Woynicz, in the summer of 1942 and '3?

A. Yes. The defendant, Mr. Woynicz, is my uncle, and I had been associated with him for the period from 1940 until 1943, when I left for the army. I had worked for him on the average of five days a week during that entire period.

Q. And where did you work for him?

A. I worked for him at the New York Thread Grinding Corporation, where he was president, and at that time I was a sub-contractor; in other words, working on a piecework basis and with a small crew of men under myself.

Mr. Weber: Just a moment, Mr. Tanner. Would you limit yourself to the questions that counsel is to ask you?

Q. (By Mr. Riseley): What was Mr. Woynicz's capacity where it came in contact with your capacity, Mr. Tanner?

Mr. Weber: Objected to as to form.

The Court: His capacity?

Mr. Riseley: Yes; his capacity at the New York Thread Grinding Corporation.

(Testimony of Edmund George Tanner.)

The Court: He may answer. Overruled.

A. Mr. Woynicz was president of New York Thread Grinding Corporation and, as some of his duties, he had full charge of [58] heat-treating and purchase of supplies and tools for the establishment. In those latter two capacities I had frequent contact with him; I would say about two or three times a day.

Q. (By Mr. Riseley): And what was the nature of this contact with him?

A. As a sub-contractor it was my duty to make up different parts on a piecework basis, and therefore I needed supplies and tools to do this; and not only that, I needed heat-treating done on the parts, which were in general hardening, and I required heat-treating in, I would say, most instances.

Q. And what would your procedure be to get this done?

A. In requiring any materials and supplies, I would go to Mr. Woynicz directly, give him a description of what I needed, when I needed it, and try to get from him an estimate of when I would get the items in question. And in the matter of heat-treating, I would bring the pieces that I had ready for heat-treating, give them to him, tell him what I wanted done, and in the same way trying to get an estimate of when I would get them back.

Q. In the summer of 1942, Mr. Tanner, did you notice anything out of the ordinary course of business about your relationship with Mr. Woynicz, that

(Testimony of Edmund George Tanner.)

is, in the shop there when you had the heat-treating done and the ordering?

Mr. Weber: Objected to as too indefinite. [59]

The Court: Sustained, indefinite. Can't you confine it to something?

Q. (By Mr. Riseley): In about August, 1942, Mr. Tanner, would you describe the way you gave these parts to Mr. Woynicz for heat-treating and the result?

Mr. Weber: Objected to as irrelevant.

The Court: Overruled.

A. Well, I can give you a description of his personal conduct at the time that I submitted parts to him for heat treatment and my results in trying to obtain them. On several occasions—enough to cause me to realize that it was much more——

The Court: That is not stating what was done. What was done?

A. On occasion I gave Mr. Woynicz parts to be heat-treated and requested that they be presented to me on the next day, and on the next day I returned, called Mr. Woynicz, and finally got him to realize that I was asking him for certain parts. He did not know which parts I had meant. I gave him full description and he finally started to look through his shop coat pockets and through his desk to see if he could find them. After a while he found them in a desk where he had put them the day before and had forgotten entirely about heat-treating them.

Q. (By Mr. Riseley): Did this ever happen again? [60]

(Testimony of Edmund George Tanner.)

A. It happened on other occasions. On one occasion I had asked for certain tools he had promised me, I think, the following day, and I returned the following day. He had again started to look in his coat pockets and his desk, and finally went out of the room into the tool room where his safe was kept for all tools and supplies. I remained in his office about three or four minutes. He did not return. Finally I decided to go to the tool room and see what happened there. When I arrived there he had gone, and gone to some other part of the shop without even bothering to come back to the office. And when I followed——

Mr. Weber: Just a moment. I think the witness is going far afield. Where he went after a certain event is irrelevant.

The Witness: It is not a full description of the event.

The Court: Go ahead.

A. I finally found Mr. Woynicz and asked him about the tools that he had promised me. He admitted that he had forgotten entirely what he went in the tool room to get.

Q. (By Mr. Riseley): Did you have any conversations with him at that time?

Mr. Weber: Objected to as indefinite.

Q. (By Mr. Riseley): In the month of September, 1942; did you have any conversations with him at that time?

A. Conversations on what subject?

(Testimony of Edmund George Tanner.)

Q. Well, on his work there. [61] A. Yes.

Q. Would you relate what the conversation was?

Mr. Weber: Objected to as indefinite. It could have been on a number of different subjects having nothing to do with the issues in this case.

The Court: Confine it to the issues in this case. We are not going into general conversations on any or everything. I am asking, counsel. What do you say about it?

Mr. Riseley: Anything that a man says reflects what his mental condition is to some extent.

The Court: Go ahead.

A. Well, Mr. Woynicz in that period of time had many lapses of memory with regards to conversation. In addition, he had a habit of being hard of hearing on the first approach. On one occasion I went into the office, called him, called him two or three times. He did not answer, even though he was only two or three feet away from me. Finally he noticed I was there and asked me what I wanted; and I told him I wanted certain supplies for a job. While he went about ordering the supplies distractions would come in. On this one occasion someone wanted him from the neighboring office and he was requested to answer a phone call. While he answered that, he did not wish to answer the phone at the time. When he turned back to me, he had forgotten what he was doing. I had to remind him once again that he was in the process of [62] ordering certain supplies.

(Testimony of Edmund George Tanner.)

Q. (By Mr. Riseley): Did he ever fail to recognize you during this period of September, 1942?

A. On a few occasions he would walk past me where I was standing in the shop, and even though I had spoken, I would fail to get any sign of recognition from him. On one particular occasion I needed something from him, went after him and finally obtained his attention. At the time he appeared startled and admitted that he had not seen me when he had passed by before.

Q. What language did Mr. Woynicz speak in around the shop mostly?

A. He spoke English, Polish, and Russian.

Q. Did you ever observe him in any political discussions? A. Yes.

Mr. Weber: Objected to as irrelevant.

The Court: Overruled.

A. Yes, he had.

Q. (By Mr. Riseley): Would you relate the incidents?

A. I observed him in political discussions in both English and Polish, since I can understand both pretty well. Well, at the time of—will you please say just what aspect of political discussions you would like me to tell about?

Q. Tell what he said during these political discussions. What did he say? [63]

Mr. Weber: May we have some statement of time?

(Testimony of Edmund George Tanner.)

Q. (By Mr. Riseley): When were these political discussions that you observed him in?

A. I would say in the early and later part of 1942. The general political discussion related to the then Russian regime at the time; and he made no pains about saying that he despise the Russian regime, thought they were nothing but—well, the very worst kind of people you could expect. He was very vehement on the subject and repeated over and over again that there was no justice in Russia and similar statements.

Q. Now, did you observe in his outward manifestations at that time when you looked at him? How did he appear to you? What did you see?

A. Well, Mr. Woynicz, when excited or when talking and great mental strain on a subject, uses great motions of arms, will wave his arms about. He has more than usual trouble with his speech at such times and his voice becomes very loud.

Q. Did he ever complain to you of being tired?

A. Yes; on numerous occasions in the morning when I would first drop into his office and see him, he would remark that he felt very tired.

Q. Would he ever use profanity during this period?

A. No. Mr. Woynicz does not use profanity as a rule.

Q. Did he ever use it on special events or in excess [64] or more than he usually had before?

A. I would say that he used it, in general, only

(Testimony of Edmund George Tanner.)

in political discussions, and that usually in referring to the Soviet regime and enemies of democracy at the time.

Q. Did he ever discuss with you his concern over his brother in Russia?

A. Yes; on many times he was quite perturbed at what would happen to him.

Q. What would he say?

Mr. Weber: May we have a statement of time, please?

Q. (By Mr. Riseley): When? When did he talk about his brother?

A. I cannot carry it down to any month. Probably in a period of early 1942 and probably up to the summer and fall of 1942. I forgot your question.

Q. Do you recall what he said about his brother?

A. He was very fearful of his life, since his brother is a professor or was a professor at the University in Poland and, as such, was considered an enemy of the people inasmuch as the Soviet regime was concerned.

Mr. Riseley: No further questions. Cross-examine.

Mr. Weber: Just a couple.

Cross-Examination

By Mr. Weber:

Q. Mr. Tanner, when did you leave the New York Thread [65] Grinding Corporation?

A. March, 1943.

(Testimony of Edmund George Tanner.)

Q. And Mr. Woynicz continued as president, to your knowledge, up until the time you left?

A. That is right.

Q. How many people were working during all this interval for the New York Thread Grinding Corporation?

A. I would say the average employed at that time was about 175.

Q. It was a rather busy place on wartime contracts?

A. That is right.

Q. Were you ever present when Mr. Woynicz executed any contracts with the Government?

A. No.

Q. You are a nephew of Mr. Woynicz?

A. That is right.

Mr. Weber: No further questions.

Mr. Riseley: No further questions.

The Court: You are excused.

Mr. Riseley: Your Honor, just after this witness, I wonder if we might have a short recess, because I will be ready for my expert after this witness comes on.

The Court: Can you call this witness now, then?

Mr. Riseley: Mrs. Kuhrke. [66]

WANDA WOYNICZ KUHRKE

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Wanda Woynicz Kuhrke.

Direct Examination

By Mr. Riseley:

Q. You are the daughter of the plaintiff and the daughter of the defendant? A. I am.

Q. Early in 1942 you lived on Wellman Avenue with the parties? A. I did.

Q. What language was spoken at home?

A. Well, mostly Polish, I would say, some English, and I believe some Russian.

Q. Were you familiar with your father's condition of health in 1942? A. I was.

Q. Would you tell the Court what it was early in 1942?

A. Well, in addition to the appendix and the fact of having the family difficulty arising at that time, I believe he was under a very severe strain at all times.

Q. Directing your attention to August the 6th, 1942, Mrs. Kuhrke, did you have any conversation with your father [67] that day?

A. Well, I don't recall if it was August the 6th, but it was somewhere in that period that he called me and asked me to come to see him, and at that particular time he had told me of the fact that he

(Testimony of Wanda Woynicz Kuhrke.)

was summoned with these papers and that my mother was suing him for a separation.

Q. Did you go to see him that day?

A. As I say, I don't know if it was August the 6th, but I did go to see him around that period of time.

Q. And where did you go?

A. I went to his office.

Q. Did you have a conversation with him there?

A. I did.

Q. Would you relate what he said at that time?

A. Well, at that time we had a private conversation behind closed doors, where he explained to me——

Mr. Weber: Just a moment. If this has to do with the merits or demerits of the separation action, I object to it as incompetent, irrelevant and immaterial.

Mr. Riseley: It is merely conduct and declaration of the person whose incompetency is in question, your Honor, that I am seeking to show.

The Court: You are not attempting to try all of the merits of the separation?

Mr. Riseley: No; not at all. It is merely to show his [68] declarations, to show the competency at that time.

The Court: Very well, overruled.

The Witness: Would you repeat that question, please?

(Testimony of Wanda Woynicz Kuhrke.)

Q. (By Mr. Riseley): Would you relate the conversation at that time?

A. Well, at the time that my father told me of the separation action, I believe both of us were very shocked. At least I knew something was brewing, but I didn't know what, but I didn't know it was as severe as my father had told me. I mean the feature that I am trying to bring out is that to me it was such a shock that I just started crying and my father joined in with me.

Mr. Weber: I move the entire answer be stricken on the ground that it is irrelevant, incompetent and immaterial, and has nothing to do with evidencing the mental state or the state of mind or mental competence of the defendant. The natural distress of this witness at the family domestic difficulties is a matter which does not throw any light on the question whether or not at the time this contract was signed Mr. Woynicz understood the nature of the transaction.

The Court: Sustained.

Q. (By Mr. Riseley): Now tell me what your father said to you that day—not what you thought or what the fact was, but what he said to you that day.

A. You mean in regards to the separation papers? [69]

Q. Yes; in regard to anything.

A. Well, in regards to the separation papers, my father told me that he felt the whole statement was false, and which I myself believed were false.

(Testimony of Wanda Woynicz Kuhrke.)

Mr. Weber: Well, I move what the witness believes be stricken.

Mr. Riseley: Just confine yourself to what your father said.

The Court: It may be stricken, what she believed. What was said?

A. And that the action—I mean that my mother was bringing up—was very severe. I mean there was difficulty at home, I agreed, but no one ever—

Mr. Weber: Mrs. Kuhrke, just answer the question.

The Court: Were they living together then?

The Witness: No, sir.

The Court: How long had they been separated?

The Witness: Well, I can't tell you any specific time, but they——

The Court: Well, about.

The Witness: In months—oh, I would say probably about three or four. I am not sure.

The Court: Go ahead.

Q. (By Mr. Riseley): Did your father discuss death to you that day? Did he say anything about death? [70]

A. Yes; he did.

Q. Now, what did he say?

A. He felt that through all this—I mean the fact of the whole turmoil that he was going through——

Mr. Weber: May I ask that the witness be instructed to tell us what was said?

The Court: What was said? Relate what he said.

(Testimony of Wanda Woynicz Kuhrke.)

A. Well, he said to me that he felt that—I mean under the conditions that I am trying to bring out—were preying on his mind so that he felt that if he was dead, that it probably would solve the problem.

Q. (By Mr. Riseley): Did he say anything about his mind?

A. Yes. I believe he told me that the pressure—I mean of the whole situation—was so severe that he felt that he was going out of his mind. And then he just didn't know which way to turn.

Q. Did he mention the Bolsheviks to you that day at all? A. Yes.

Q. What did he say?

A. He pointed out that it seemed that the fact that we had lived here in the United States, that they were using communistic system of bringing up, say, false accusations and things of that sort?

Q. Did he mention his health to you that day, or had he in that month of September, 1942? [71]

Mr. Weber: Just a moment. I dislike to make the objection that the questions have been leading, but can't we have a question that will cover in general form the entire conversation that took place at this time, instead of having different typical subjects fed to the witness one after the other?

The Court: He has a right to ask the questions, and there is no way to see whether they are competent. Go ahead.

Mr. Riseley: Would you read the question to the witness, Mr. Reporter?

(Testimony of Wanda Woynicz Kuhrke.)

(Pending question read by the reporter.)

A. Yes; he had pointed that out, his physical endurance. He was wondering whether or not he would be unable to continue his work and whether or not he was going to have his mind under all the pressure that was on him from my mother.

Q. Did he say anything about sleeping?

A. Yes. He had a great deal of trouble sleeping at that time; the fact that he would probably go to bed and just toss and turn all night and not get a wink of sleep, and he would have to go to business the following day exhausted.

Q. Did you ever observe him to cry during that period in September, 1942, and August, 1942?

A. Well, yes; quite frequently, particularly since we discussed the case at hand.

Q. Did he ever mention his father to you at that time in that period? [72]

A. Yes. He mentioned the fact that his father had committed suicide and that if he would probably do the same, he felt that that would probably help to solve the problem which was at hand.

Q. Did he ever mention your brother in the service at that time? A. Yes; he did.

Q. What would he say?

A. Well, he was wondering about his whereabouts, the fact that he was going to be shipped overseas and into great dangers which were in front of him.

(Testimony of Wanda Woynicz Kuhrke.)

Q. Now, as you observed your father when you went to see him in August, 1942, would you describe to the judge how he appeared to you and what you saw?

A. Well, my father was what I would say was physically worn out from the mental strain that he was under. He was trying to conduct the business; he was trying to save his home; he was trying to salvage something out of the whole situation, which seemed to just crumble all up.

Mr. Weber: May I ask that the witness be instructed to answer the question as to how Mr. Woynicz looked to her in August of 1942?

The Court: Yes.

Mr. Weber: Instead of trying to summarize the many things that he was trying to do. [73]

The Court: You are asked a question: How he appeared to you.

A. Well, my father, as I still say, looked worn out. I mean a person, to have all this around him, there certainly is a definite change in their physical well-being.

The Court: Don't argue the question. Answer how he appeared to you.

A. He seemed to be worn out, as I said before.

The Court: Now, you said that three times.

The Witness: Yes.

Q. (By Mr. Riseley): Did you notice anything about his hands?

A. Yes. I think, due to the fact of the extreme

(Testimony of Wanda Woynicz Kuhrke.)

tension that was about him, he became very nervous and his hands shook.

Q. Did you notice his cheek?

A. Yes. There was a peculiar nerve reaction there which was under certain conditions, or probably talking, this nerve would twitch and it would twitch rather violently at times.

Q. Had you ever noticed that before this period of August and September, 1942?

A. No.

Q. Did your father ever mention people being killed in accidents to you?

A. Yes; he did.

Q. What did he say? [74]

A. Well, he often mentioned that there had been at least freak accidents or just accidents that have happened every day, and that people are being killed quite frequently, and under his depressed mind at that time he felt that he should be one of the victims, but he was not.

Q. Did he ever discuss Mr. Zimmerman with you?

A. Well, yes; he did. Mr. Zimmerman was my——

Mr. Weber: Just a moment. The question has been answered.

The Court: Proceed. Go ahead.

Q. (By Mr. Riseley): What did he say?

Mr. Weber: Objected to as irrelevant, also incompetent and not binding on the plaintiff.

(Testimony of Wanda Woynicz Kuhrke.)

Mr. Riseley: Offered solely as a declaration of the person whose incompetency is in question, to show declarations as to what he said, to either show his competency or his incompetency.

The Court: She may answer. Overruled. You may answer. Go ahead.

A. My father had told me about Mr. Zimmerman being his attorney, and at the time, he asked me to see him and see what I could do to help him out, and I agreed to go to see Mr. Zimmerman.

Q. (By Mr. Riseley): Is that all he ever said to you about Mr. Zimmerman? A. No. [75]

Q. What did he say?

A. He felt that Mr. Zimmerman did not seem to help him. I mean he added no solution to the problem that my father was facing.

Q. Did he say anything about witnesses or anything like that? Did he say anything about witnesses? A. Yes; he did.

Q. What did your father say to you?

A. My father told me that it seemed to be hopeless that he would have any witnesses in the case; of the fact that whenever he offered any particular person, say, as a witness, Mr. Zimmerman felt that he would not be the proper sort of witness to have, particularly saying employees in his firm. He felt that due to the fact that they were in his employ, that the witnesses would probably say what my father wished them to say due to the fact that they were paid a salary.

(Testimony of Wanda Woynicz Kuhrke.)

Q. Directing your attention to September 16, 1942, did you see your father on that day?

A. I did.

Q. And what was the occasion?

A. It was my twenty-second birthday.

Q. Did you talk to your father that day?

A. I did.

Q. And what was said?

A. Well, he asked me to come in to see him, and at which time he wished me a "Happy Birthday," which my mother did not; [76] and he at that time was taking me out to dinner for a small celebration.

Q. Do you recall anything said to you that day?

A. Yes. He said he was sorry that the party had to be away from home and that the proper place, of course, would be at home, but the way the situation was at hand at that time, it was impossible.

Q. Did he ever complain to you about forgetting things or not being able to think or anything of the sort?

A. Yes; quite often. The fact that in maintaining his business——

Q. What would he say? That is what we want. What would he say?

A. Well, he would say that he couldn't keep his mind on his work. I mean there was a great deal of responsibility there. There were men under his supervision and there were contracts that had to be

(Testimony of Wanda Woynicz Kuhrke.)

fulfilled, and at times he felt that—I mean his mind was just in a whirl.

Q. Did he ever talk to you about his brother in Poland? A. He did.

Q. At that time what did he say?

A. Well, my uncle at that time was shipped to Siberia.

Q. He told you this? A. Yes.

Q. Continue. [77]

A. And the stories he related to me would go back to some of the known truths of today, the horrors and conditions which existed there, and that seldom people ever survived the ordeals and that they would die, which my uncle did.

Q. Did he ever mention politics to you?

A. In what respect?

Q. The Bolsheviks, for instance.

A. Well, yes. He hated them.

Q. What would he say? Would he talk on it a short period, or how often did he talk about it?

A. Well, when he used to get into a discussion, he would bring out the points of the way of their code of living; that anyone who stood in their way, whether right or wrong, would be destroyed or be sent into exile, and they were given that long term of punishment which, most naturally, meant death.

Q. How frequently would he mention this?

A. Well, quite often, due to the fact that my uncle was there and that, I think, preyed on his mind a great deal.

(Testimony of Wanda Woynicz Kuhrke.)

Q. Did you observe him one day in Mr. Zimmerman's office, in September of 1942?

A. Yes; I was there.

Q. Would you tell how he acted on that day, what you saw him do or what he said?

A. Well, I went there to talk over the case with Mr. Zimmerman and get some of the few points that were on hand. [78] I mean some of the points that were brought out I objected to quite strongly and tried to influence my father.

Q. What did he say to you? What did you say to him, now, when you were trying to influence him, and what did he say to you? That is what I want.

A. I felt that the agreement was——

Mr. Weber: Is this what you said?

A. Yes. I felt that the agreement was too strong. It took everything; it demanded so much of my father and his entire family.

The Court: Go ahead, go ahead. Let us not waste time any longer.

The Witness: I am sorry, sir.

The Court: I want to get through with this case.

A. I mean the demands right down the line and the whole agreement, they left nothing for his family, nothing for him.

Q. (By Mr. Riseley): What did he say when you tried to tell him?

A. Well, he felt probably it was the best thing. He was not sure. I kept trying. I tried to tell

(Testimony of Wanda Woynicz Kuhrke.)

him of the serious consequences of signing such a thing.

Q. Did he mention Moscow trials at all at that time?

A. He did; the fact that he was being railroaded right down the line. He felt it was the same thing.

Q. Did he say anybody had told him it was to be a [79] Moscow trial? A. I don't recall.

Q. Did he ever talk to you about the trains?

A. In what respect? You mean his physical well-being?

Q. No; the trains, railroad trains.

A. Well, I think my father was thinking of committing suicide, as he has often said, to probably solve the problem.

Q. What did he say—not trying to reason why he said it, but just what did he say?

A. He said that he would like to have jumped in front of trains and probably killed himself.

Q. Did he ever mention his past demolitions experience to you?

A. Yes; he has often related some of the stories and facts that he was in the service under the Czarist Russia and that he was in the engineering corps, and that they went on these different maneuvers where they blew up bridges and built bridges and such.

Q. Would he say anything further about it?

A. Well, the fact that my father was so de-

(Testimony of Wanda Woynicz Kuhrke.)

pressed at all times that he felt that if, in some way he could destroy himself. I mean the fact blowing himself up or something, or killing himself in some way, maybe he could free himself of the problem.

Q. Did he ever say anything to you about refusing to take [80] your testimony?

A. Yes; he did. Mr. Zimmerman wanted my testimony in writing.

Q. That is what he said? A. Yes.

Q. Go ahead; tell me everything he said.

A. Mr. Zimmerman said that the testimony would be submitted in writing and that I would have to answer questions. I mean for my father's defense, of course, against my mother. And my father said under no circumstances would his children testify against their mother regardless of what the situation was between them. He at all times wanted to safeguard his children.

Q. Did he ever mention religious subjects to you or God to you at that time?

A. I believe so.

Q. What did he say?

A. Well, he pointed out that God probably was not just to him, and that maybe there was a God on this earth. He said if he had any justice, that he would probably take his life.

Q. Did he ever mention Camp Upton to you?

A. Yes.

Q. What did he say about Camp Upton?

A. The fact that my brother was stationed there

(Testimony of Wanda Woynicz Kuhrke.)

and [81] he was going to be shipped out, and that he wanted my mother to go there. Going back to the city where we had our bungalow camp, up on the road back, and the party at that time was broken up in two—those traveling in my father's car and those traveling in the car that belonged to Lucy and Helen——

Mr. Weber: I take it you are offering this, too, as indicating a lack of mental competence; is that right, counsel?

Mr. Riseley: Either to indicate a lack of or mental competence. I was asking what her father said to her about the Camp Upton incident, rather than what happened.

Mr. Weber: I take it you are inquiring——

The Court: Go ahead. You can argue the case after.

A. My father felt that my mother should come to see her son off. After all, he was an offspring of both parents, and in some way, a verbal agreement, she agreed that she probably would come there, but she did not. She continued on home to the Bronx.

Q. (By Mr. Riseley): Now, Mrs. Kuhrke, you were intimately acquainted with your father in the period of August and September of 1942, were you not? A. I was.

Q. Do you have an opinion as to his mental competency at that time?

A. Well, I wouldn't say that——

(Testimony of Wanda Woynicz Kuhrke.)

Q. Just do you have an opinion? [82]

A. Yes.

Q. What is your opinion?

A. My opinion of my father's mental state at that time was, I think, more or less a borderline case, where he would go around doing routine things and not being aware of the fact that things were about him, when he was torn between two ends. I mean the fact of maintaining a business and trying to salvage——

Mr. Weber: Just a moment. The question was: What is her opinion?

The Court: What is your opinion?

Q. (By Mr. Riseley): Was he incompetent or was he competent?

A. I don't think he was competent.

Mr. Riseley: No further questions. You may cross-examine.

Cross-Examination

By Mr. Weber:

Q. When did you think he became competent after this time, Mrs. Kuhrke?

A. I don't think he has fully recovered.

Q. And that condition has never changed, according to your opinion, is that right?

A. Well, I couldn't say that entirely. He was told by doctors to——

Q. No, Mrs. Kuhrke. My question is simply: In your [83] opinion, that state has never changed?

(Testimony of Wanda Woynicz Kuhrke.)

Mr. Riseley: I will object in this, that I think counsel should first lay the foundation as to whether or not she was able to observe him all the time over all the intervening years.

The Court: You have gone into it and gotten her opinion. He has a right to cross-examine.

Q. (By Mr. Weber): Let me ask you this: You saw your father practically several times a week in August of 1942? A. I did.

Q. How about September of 1942?

A. I believe I did.

Q. Two or three times a week?

A. Possibly.

Q. And October? A. Yes.

Q. And the rest of the months for the balance of that year? A. Yes.

Q. Did he go to work every day during those months? A. He did.

Q. And similarly in 1943? A. Yes.

Q. And in 1944? A. I believe so. [84]

A. And in 1945? A. Yes

Q. And in 1946? A. Yes.

Q. And throughout those years Mr. Woynicz remained president of the New York Thread Grinding Corporation? A. Yes.

Q. Were you ever present when Mr. Woynicz signed or negotiated any contracts with the government agencies for war products? A. No.

Q. Were you ever present at any time when Mr.

(Testimony of Wanda Woynicz Kuhrke.)

Woynicz was purchasing supplies for the New York Thread Grinding Corporation? A. No.

Q. Were you ever present when Mr. Woynicz signed checks on behalf of the New York Thread Grinding Corporation?

A. I might have been in the office at the time that he was in the process of doing the same.

Q. Upon how many such occasions were you present? A. I don't recall.

Q. During any of that period of time—I think I asked you that. Was Mr. Woynicz absent from his work for any period of time?

A. No; only during the time that he had to go for an [85] operation.

Q. During the time Mr. Woynicz was discussing with you the papers that had been served on him, he reported to you, from time to time, the records of his discussions with Mr. Zimmerman?

A. Yes.

Q. And on one occasion he suggested that you go and see Mr. Zimmerman? A. He did.

Q. Who was present at that conversation with Mr. Zimmerman which you attended?

A. Just Mr. Zimmerman and I.

Q. You never did meet Mr. Simon, did you?

A. No, sir.

Q. And the conversation to which you referred was the conversation in which you discussed, in the presence of your father, the desirability of signing this separation agreement?

(Testimony of Wanda Woynicz Kuhrke.)

A. I first spoke to Mr. Zimmerman by myself.

Q. Oh, you had a separate meeting with Mr. Zimmerman, did you? A. Yes.

Q. In other words, there were two meetings—one merely between yourself and Mr. Zimmerman, and the second one in which your father was present?

A. Well, my father was present at the conclusion of [86] the conversation the two of us had together.

Q. At what meeting was it that Mr. Zimmerman told you that, in his opinion, the testimony of employees would probably be valueless since they were on the payroll or salary of Mr. Woynicz? Was that the one that you attended alone?

A. That was the meeting that I believe my father was with me at the time, that one and only meeting I had with Mr. Zimmerman.

Q. And at what meeting was it that your father said that he felt it was the best thing to do?

A. The best thing to do what, to sign the contract?

Q. Sign the contract; was that the one that you attended? A. No, sir.

Q. And he told you that outside of the meeting with Mr. Zimmerman, is that right? A. Yes.

Q. Just the two of you were present?

A. Yes.

Q. By the way, did you ever see Mr. Woynicz sign any of these checks? A. I did.

Q. About how many did you observe?

(Testimony of Wanda Woynicz Kührke.)

A. Well, quite a few.

Q. Can you tell me approximately which ones you observed, from the standpoint of time? [87]

A. Well, I believe all of those, or possibly a great number of them from the end of 1942 up to the time that he went to Florida.

Q. Were you living together? A. Yes, sir.

Q. And you saw him sign those checks more or less regularly, is that right? A. That is right.

Q. And throughout the entire period from September, 1946, to the time Mr. Woynicz went to Florida, he made his home with you?

A. Right.

Q. During those years did Mr. Woynicz read the papers? A. Yes.

Q. Newspapers? A. Yes.

Q. And did he discuss with you the topics of the day? A. Quite frequently.

Q. Discuss the war situation? A. Yes.

Q. And the progress of military events?

A. Yes.

Q. His hatred for the Russian regime?

A. Right.

Q. Did he correspond with your brother on occasion? [88] A. Quite frequently.

Q. And he wrote letters, himself, did he?

A. Yes, sir.

Q. In the English language?

A. I believe so.

(Testimony of Wanda Woynicz Kuhrke.)

Q. About how many times would you say you visited the shop in the year 1942, Mrs. Kuhrke?

A. I have no idea.

Q. Upwards of a dozen?

A. Probably more.

Q. And in the course of your visits did you observe Mr. Woynicz giving instructions to the employees under his supervision?

A. Well, not that much. I used to drop in probably after work or before work.

Q. And you had an opportunity to observe him giving instructions to personnel under his supervision?

A. I believe most of his supervision was probably done outside of the office, with a few exceptions, of course.

Q. And on occasion his duties would take him in contact with office personnel as well?

A. Right.

Q. About how many checks would you say you saw your father sign, referring now to the checks comprising——

The Clerk: Exhibit 10. [89]

Q. (By Mr. Weber): Plaintiff's Exhibit 10?

A. Well, I believe there were something like four a month.

Q. And you had an opportunity to observe his signature on those checks, is that right?

A. I did.

Q. I show you at random check dated October 5,

(Testimony of Wanda Woynicz Kuhrke.)

1942, and ask you whether or not at the time that check was signed, in your opinion, your father was competent or incompetent?

A. You mean whether he was competent to write a check or otherwise?

Q. Was he competent to write a check?

A. Yes; because, after all, this was part of an agreement which he had to fulfill.

Q. And he indicated to you that at the time he wrote the check he knew he had to sign such a check, is that right? A. Yes.

Q. I show you another check dated October 12, 1942, and ask you whether or not, in your opinion, at the time your father signed that check he was competent or incompetent?

A. I would say he was competent enough to write the checks, and I say it is his duty because of the fact he had to fulfill his part of the agreement.

Q. And he indicated to you that he knew that?

A. Yes. [90]

Q. I show you another check dated September 6, 1943, and ask you whether or not at the time your father signed that check, in your opinion, whether he was competent or incompetent?

A. Again, I say he was competent enough to sign the check.

Q. And to know what it was for? A. Yes.

Q. And that it was executed pursuant to the agreement which he signed? A. Yes.

(Testimony of Wanda Woynicz Kuhrke.)

Mr. Weber: No further questions, your Honor.

The Court: You are excused.

Mr. Riseley: If it please the court, I can have an expert here in 10 minutes.

The Court: No. We are about ready to adjourn. You ought to have had him here before adjournment, in court hours. We are about ready to adjourn. Have him here tomorrow.

Mr. Riseley: Yes, your Honor.

The Court: We will recess until tomorrow morning at 10:00 o'clock.

(Whereupon, a recess was taken until the following day, Wednesday, March 8, 1950, at 10:00 o'clock a.m.) [91]

Wednesday, March 8, 1950

The Court: Proceed.

Mr. Riseley: Dr. Walter Z. Baro.

DR. WALTER Z. BARO

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: And your full name?

The Witness: Walter Z. Baro, B-a-r-o.

Direct Examination

By Mr. Riseley:

Q. What is your profession?

(Testimony of Dr. Walter Z. Baro.)

A. I am a physician and surgeon.

Q. Where do you have your offices?

A. At 417 South Hill Street.

Q. Would you state your qualifications?

A. I graduated in 1936 from the Italian University Medical School at Bologna in Italy. I had a surgical internship in Italy Orthopedic Hospital, in Italy. I also had post-graduate work in psychiatry at the University of Florence, Italy. In this country I had a rotating internship at the Naval Center in Jersey City, New Jersey. I was there also in charge of the psychopathic admitting ward. I had three residencies: One in Brooklyn, New York, one in Ada, Oklahoma, and one in Lancaster, South Carolina. [93]

I joined the service in September of '42 and was released on account of a disability in '44, in March of '44, and spent from 1944 to 1946 at the mental hospital, now called the Brentwood Hospital of the Veterans Administration at West Los Angeles.

I have been in practice since June of 1946, being duly licensed in the State of California, limiting my practice to mental and nervous diseases.

From July 1, '46 to July 1 of '49 I was a psychiatrist on the Commitment Board of the Juvenile Hall, under the supervision of the Superior Court of the County of Los Angeles. I am a consultant of the Juvenile Court.

I was an examiner for the Industrial Accident Commission of the State of California. I was one

(Testimony of Dr. Walter Z. Baro.)

of the two examiners for the Psychopathic Court Clerk of the Superior Court of the County of Los Angeles.

I think that is, in short, my qualifications.

Q. Do you know the defendant, Leonard Woynicz? A. I do.

Q. Have you examined him? A. I have.

Q. What did you do?

A. The first time I saw the defendant was on May 11th, 1949. At that time I examined him and issued an affidavit. I re-examined him again on March 3, 1950. At that time I [94] obtained the following history:—

Mr. Weber: Objected to as irrelevant, incompetent and immaterial. This witness is being offered as an expert, I submit, your Honor, and the way to obtain the opinion of this witness is to propound a hypothetical question.

The Court: The court cannot direct how he is to form his questions.

Mr. Weber: But I submit the history, in entirety, given by the defendant is irrelevant, incompetent and immaterial, not binding on the plaintiff.

The Court: I do not know whether he is submitting it for that purpose or other purpose. He may be inquiring from facts in his own mind that he knows. He has a right to inquire. Overruled.

A. I obtained a history from the defendant that he went to school about five years in Russia; also, his schooling was done in a trade school. He knows

(Testimony of Dr. Walter Z. Baro.)

how to write and to read a little bit in the Polish language and the Russian language and the Lithuanian language, and also in the English language.

He served in the Russian Army for four and one-half years, from 1906 to 1910, and had the rank of top sergeant. It is probably equivalent to our first sergeant.

He came to this country in 1911. He brought his wife, to whom he was not married at that time, to this country in 1916. He told me that his wife was a school mate of his sister. [95] He married on December 26, 1916, and had four children. The first child died, the second was a boy, the third was a girl, and the fourth child was a boy.

He noticed that about 1922 his wife became quite argumentative. He recites an incident that while they were eating dinner company was there and his wife started eating before the rest of the people, and he reprimanded her and his wife got up from the table and, according to his statement, for two and one-half years she did not talk to him at all; the conversation between the two was through a third person, the children, or through slips of paper.

Then she left him for about six weeks and she wrote home a letter. In this letter she stated that he had beaten her. And then suddenly, unexpectedly one day she walked into the house, and he describes this entrance rather vividly, inasmuch as the children were rather frightened and ran over to him. His wife demonstrated some blue marks on the

(Testimony of Dr. Walter Z. Baro.)

right side of her body and she told him that a train had hit her.

However, in view of the fact that the children were small the defendant told me that he reconciled with the wife and on her insistence they sold the farm and he bought a house.

Then in 1925, during her last pregnancy, his wife attempted suicide by taking corrosive poison. But due to the help of doctors she was saved and she delivered the last baby boy. However, he noticed that for six weeks she would not touch [96] that child at all.

Then at that time he worked in New York and they lived in Lakewood, New Jersey. Since he had to travel from New York to Lakewood and the only way he could travel was over the week-end, finally the family moved to New York in 1932.

The relationship with his wife was rather casual and in 1942 she served him with divorce papers. At that time the defendant was, as he states, working rather hard. He got up at 4:00 o'clock in the morning and worked until 11:00 o'clock at night.

Her lawyer wrote to him and he called the attorney up, and at first, as he states, he thought the whole thing was a joke. And then he finally was subpoenaed and through some friends he went to an attorney by the name of Zimmerman. He states that one of the accusations in the divorce suit was that he spent the time during the day with women, and there was especially one girl with whom he sup-

(Testimony of Dr. Walter Z. Baro.)

posedly spent time. And he told me that one of his boys was in love with that particular girl.

Then during the divorce procedures and also after the divorce procedures he was under the care of doctors and at their request he went to Florida.

Now, at the time of the divorce suit he had all kinds of ideas, as, for instance, he asked his attorney: "Is this a Moscow trial?" And supposedly the attorney said: "It is the [97] same thing." And the reason he asked that was because one of his brothers was murdered by the Bolsheviks.

The Court: Are you relating now what he told you?

The Witness: That is right. That is exactly what he told me, verbatim.

The Court: Have you got notes of it taken at the time?

The Witness: That is right. That is right; I have notes right here, your Honor.

The Court: All right.

A. He told me that one of his brothers was murdered by the Bolsheviks, and he had heard and also seen about the Moscow trials in a movie, and also newspapers. And he said, verbatim, "I was losing ground and faith." And he felt: "All right, if this is supposed to be like a Moscow trial, I will sign everything which is handed to me."

Then at around the same time he had to have surgery and, as every doctor, the doctor who operated on him told him there is always a chance that

(Testimony of Dr. Walter Z. Baro.)

one could die. And while he was given the anesthetic—and this, again, is his own words—he said, “God, let me not see the light again.” That is the last wish which he had before he underwent surgery.

After leaving New York he went to Florida and he stayed down in Florida until about 1947, and was under constant doctor’s care there, and he improved and he got better and finally came to California. [98]

Q. Now, at the present time, especially on——

Mr. Weber: Is this also part of the history, your Honor?

The Court: I asked him and he said, “Yes.” He said he told him these things. He has got the history. He stated that he is relating the history that this man related to him as a doctor.

A. On March 3rd I obtained a further history about his present condition, and he was rather depressed at that time. He started to cry during the examination and he said, verbatim, “I wish God would kill me. My father committed suicide. I don’t think he did the wrong thing.” And that was a short history which I obtained, your Honor.

The Court: Go ahead. Don’t take so long to ask these questions.

Q. (By Mr. Riseley): Dr. Baro, suppose that a man was born in 1884; that in March, 1940 he developed an acute appendicitis, and that in June, 1941, he had a recurrence, was operated on for an

(Testimony of Dr. Walter Z. Baro.)

acute appendix; that in March, 1942, he had a hernia; that for several months prior to August, 1942, he had been under a doctor's care, although working 12 to 16 hours a day; that during this time he was worried a great deal about a brother in Poland who was killed by the Bolsheviks; that he was also worried about a son who was in the service, and had marital troubles with his wife; that in August, 1942 his wife sued him for separate maintenance and made serious charges of [99] misconduct against him; that these charges were a great shock to him and he considered them unfounded; that he had severe headaches; that he could not sleep and was taking sedatives under doctors' prescriptions; that he was confused; that he had thoughts of suicide and told his daughter that his father had committed suicide and he thought he had done the right thing; that he told his daughter that he wished somebody would come and kill him so that he would not have to commit suicide; that he was afraid he was going insane; that he was very depressed and would lie quite motionless for hours at a time without sleeping; that he frequently had crying spells; that he had muscular trembling, his hands shook and the nerves in his cheek would vibrate involuntarily; that he became forgetful; that he was in charge of heat-treating and purchasing in a machine tool business and often would lose parts given to him and forget to place orders, and assume that all of the above was his condition during August and September, 1942.

(Testimony of Dr. Walter Z. Baro.)

Now, Doctor, assuming the above facts, do you have an opinion as to the man's mental condition during the month of September, 1942?

Mr. Weber: I would like to object to that hypothetical question upon the ground that it is not based upon a full summary of the evidence introduced here, and that the facts assumed in the hypothetical question represents but a fraction of the evidence that was introduced in this trial and, in our [100] view, the testimony of an expert cannot be based on a fraction of the evidence, but must be based upon a fair summary of the whole thereof.

The Court: Overruled. Go ahead, go ahead.

A. I have an opinion.

Q. (By Mr. Riseley): What is your opinion, Doctor?

A. My opinion is that the man, due to external influences, developed severe nervousness, and finally developed what we call in mental and nervous diseases a reactive depression. That means a depression and reacting due to facts which have influenced him in that particular time. And a reactive depressive patient is a patient who very frequently will commit suicide. He not only talks about it, but has lost at that particular time the facts of reality. These patients do not live in reality. And, in my opinion, that was his mental condition at the time in 1942.

Q. Assume that the man's condition remained the same between September, 1942, and the latter part

(Testimony of Dr. Walter Z. Baro.)

of 1947; that he was under doctors' care during all this time and was finally advised to go to Florida, and he went to Florida in 1947. Do you have an opinion as to his mental condition between September, 1942, and the latter part of 1947?

A. I have.

Mr. Weber: We make the same objection to this.

The Court: The same ruling, overruled. [101]

A. I have.

Q. (By Mr. Riseley): What is your opinion?

A. My opinion is that he probably slightly improved during that time, but I do not think that he recovered.

Mr. Riseley: Cross-examine.

Cross-Examination

By Mr. Weber:

Q. Dr. Baro, in September of 1942, in your opinion, do you think that Mr. Woynicz had the mental competence to read a newspaper and understand it?

A. I don't think so.

Q. And your opinion is that at that time he lacked mental competency to discuss military events then in progress with his family, for example?

A. I don't think so, either.

Q. In your opinion, Mr. Woynicz in September of 1942 lacked the mental competence to transact business?

A. I think it depends entirely what type of business.

(Testimony of Dr. Walter Z. Baro.)

Q. Well, would you say that Mr. Woynicz had the mental capacity to go to his employment every day and exercise some of the duties of his position as president of the New York Thread Grinding Corporation?

A. I think he could have partly. It is surprising, sometimes, what mental patients can do.

Q. Yes. And sometimes, although they have some mental [102] ailment, they have perfect competence, for example, to sign a contract with the government?

A. I think, if that is something which he used to do regularly, yes.

Q. For example, a person suffering what you have described as reactive depression, oftentimes is quite competent to sign a contract, even though they experience this depressive state that you refer to?

A. I think, counsel, I answered before, certain contracts. It depends on the type of contract. If he used to see them frequently and sign certain types of contracts like you relate, government contracts, it becomes automatic. But if there is something which is new, which is especially a disturbing factor, I do not think he is competent to do it.

Q. At the time that Mr. Woynicz gave you this history did he make known to you the fact that he had attended his duties uninterruptedly from August, 1942, to December, 1946?

A. His duties, uninterruptedly, in New York do you mean?

(Testimony of Dr. Walter Z. Baro.)

Mr. Weber: Would you read that question back, please?

(Question read by the reporter.)

The Witness: Would you clarify this question by what type of duties you are talking about?

Q. (By Mr. Weber): Did he tell you that he went to his business every day during those five years? [103]

A. First, it was four years, and he told me that. He told me that he was working; that is right.

Q. Wouldn't you consider the fact that he went to his employment practically every day during that interval as having some bearing on whether or not he had a mental competence at that time?

A. It would surprise you, counsel, how many people go to their business and are not mentally competent.

Q. Well, would you say that it has a bearing on the question as to whether or not Mr. Woynicz was competent at that time?

A. In my assumption, based upon my experience, it has no bearing whatsoever.

Q. Would you say that the continuance of his duties in charge of the purchasing of materials for New York Thread Grinding Corporation at that time has a bearing, in your opinion, as to whether he was competent or incompetent at that time?

A. I think I answered you that question before. This is automatic. This he has been doing for some years. It is always the same.

(Testimony of Dr. Walter Z. Baro.)

Q. Doctor, does it have any bearing, in your opinion, on the issue as to whether he was competent or not? It is a relevant circumstance—let us put it that way?

A. In my opinion, it has no relevance whatsoever. [104]

Q. Would you say the same with respect to the signing of checks by Mr. Woynicz in connection with his employment?

A. I would say identically the same thing; that it would not have any bearing as far as my situation is concerned.

Q. In other words, it makes no difference, in your opinion, concerning a man's competence or incompetence as to whether or not he issued and knew the purpose of checks in the regular discharge of his duties? A. That is correct.

Q. It has no bearing whatsoever?

A. It has no bearing in my opinion.

Q. Even though he comprehended the purpose and reason for a check or a particular series of checks?

A. You have to prove it to me that he did comprehend——

The Court: Do not argue with the attorney.

A. I have to answer the same way. In my opinion, it does not have any bearing.

Q. (By Mr. Weber): In other words, if he drew a check and knew exactly what the check was for, in your opinion, it has no bearing as to whether

(Testimony of Dr. Walter Z. Baro.)

he was competent or incompetent at the time so far as the transaction is concerned?

A. It has no bearing. If I can be permitted, your Honor, to qualify my answer?

The Court: Go ahead.

A. We know, doing this type of work on incompetency or [105] competency, that a lot of people are declared incompetent but they know exactly the value of a check. There are a lot of people who are incompetent and they know the value of money, and still there are certain actions that will prove to us that they are incompetent.

Q. (By Mr. Weber): Doctor, in your opinion, was Mr. Woynicz competent to understand that his wife was suing him for separation?

A. I think he understood that.

Q. And, in your opinion, was he competent to understand in August of 1942 that his wife was asking for temporary alimony in that action?

A. That is a very difficult question for me to answer. I think it was explained to him by his attorney. I am not so sure if he understood the definite, ultimate results.

Q. In your opinion, does the fact that the defendant, Mr. Woynicz, understood that he was being sued for temporary alimony by his wife have any bearing whatsoever upon his competence or incompetency at that time?

A. I think it has a lot of bearing on his incompetency.

(Testimony of Dr. Walter Z. Baro.)

Q. And I take it that by that statement, you mean that his knowledge that he was being sued for temporary alimony as coincident to the separation action does have some bearing, but an adverse bearing on his competency, is that right?

A. No; I don't think it had an average bearing. I think [106] it had a very severe bearing. As a matter of fact it produced, in my opinion, mental illness.

Q. Do you think Mr. Woynicz understood at that time that his wife was asking for counsel fees?

A. I don't think he understood it, because he left everything up to his attorney.

Q. In other words, it is your opinion, I take it, that he did not know that counsel fees were being asked of him in that action?

A. I can't answer you that question directly because, unfortunately, I did not ask him. But, as he explained it to me——

Q. Well, we are interested in your opinion at this moment, Doctor. In your opinion, did Mr. Woynicz understand that his wife was asking for counsel fees in that separation action?

A. I don't think he understood it, because, as he told me, he left everything up to his attorney.

Q. And you have the same opinion that he did not understand that his wife was asking for temporary alimony in that action?

A. I told you that he understood that, but I do not think he understood the ultimate result and the ultimate effects.

(Testimony of Dr. Walter Z. Baro.)

Q. Doctor, would the nature and extent of the conferences [107] and negotiations that took place between Mr. Woynicz and his attorney, Mr. Zimmerman, have a bearing upon your opinion as to whether he was competent or incompetent at that time.

A. Can't you qualify that question? "Nature," what do you mean by nature of conferences?

Q. Well, would the subjects discussed between Mr. Woynicz and Mr. Zimmerman have a bearing on your opinion as to whether Mr. Woynicz was competent or incompetent at that time?

A. I don't think so.

Q. In other words, no matter what they discussed, it is your opinion that it would not have any bearing? A. That is correct.

Q. And even though Mr. Woynicz knew perfectly well that he was signing a separation agreement, in your opinion, he did not have the competency to execute that separation agreement?

A. Exactly.

Q. Even had he discussed each of the clauses with Mr. Zimmerman?

A. That is correct.

Q. And I take it that if, for example, after reading this contract, Mr. Woynicz insisted on certain changes being made in it or in the draft of it, in your opinion, that would [108] have no bearing whatsoever whether he was competent or incompetent to the extent that he was signing a separation agreement?

(Testimony of Dr. Walter Z. Baro.)

A. I would like to qualify my answer this way, counselor: I think that he did not realize and comprehend the ultimate results, and that is my basis for believing that he was incompetent, even if he at the time asked for changes, even if at the time, let us say, he comprehended what was told to him.

Q. Doctor, if upon reading a part of this separation agreement Mr. Woynicz said to Mr. Zimmerman: "I insist that you strike out my wife's request for visitation privileges so far as Robert is concerned," in your opinion would that have any bearing upon your opinion as to whether Mr. Woynicz understood what he was signing when he signed this separation agreement?

A. It would have a bearing to increase my belief of incompetency, because the man had such a hatred at that particular time against his wife.

Q. And if Mr. Woynicz insisted to Mr. Zimmerman, after reading a draft of this contract, that he wanted more time to remove from the premises then jointly occupied by the parties, would that have any bearing at all upon your opinion as to whether or not Mr. Woynicz knew he was signing a separation agreement when he signed this document, referring [109] to Plaintiff's Exhibit 1?

A. I think I said to you, counselor, that he knew that he was signing something, but my opinion is that he did not know the ultimate results.

Q. When you say he knew he was signing some-

(Testimony of Dr. Walter Z. Baro.)

thing, you mean by that, I take it, that he knew he was signing a separation agreement?

A. He knew he signed something which his attorney handed to him.

Q. Would you say that he knew that it was a separation agreement?

A. Possibly that it was a separation agreement; yes.

Q. Well, aren't you sure that he knew that, Doctor?

A. It was explained to him by his attorney.

Q. That it was a separation agreement?

A. That is right.

Q. And, in your opinion, he understood what that meant?

A. No; I didn't say that. In my opinion, he did not understand the ultimate results of the signing of this document.

Q. Doctor, I am referring now to Exhibit 1. Would the fact that Mr. Woynicz told Mr. Zimmerman to eliminate the provision with respect to visitation privileges on the part of the wife toward the son, Robert, have any bearing upon your opinion as to whether he knew this was a separation agreement? [110]

Mr. Riseley: I object to the question. I believe it has been asked and answered, your Honor.

The Court: Overruled.

A. I mean I have to answer this way: He knew

(Testimony of Dr. Walter Z. Baro.)

that there was a separation agreement, but he did not know the ultimate result in signing.

Q. (By Mr. Weber): And, in your opinion, he knew, did he not, that the separation agreement involved matters of custody of the children?

A. Certainly.

Q. And he knew it involved matters of alimony?

A. That is right.

Q. And he knew it involved matters of removing from the premises at 2929 Wellman Avenue?

A. That is correct.

Q. And he knew it involved matters of removing tools from the house, under this separation agreement?

A. That is right.

Q. I show you check marked Plaintiff's Exhibit 6, dated September 23, 1942, in the sum of \$350, payable to Jack Klaw and ask you, Doctor, whether or not the fact that Mr. Woynicz knew that was a check for counsel fees, payable to his wife's attorneys, has a bearing on your opinion as to whether or not at that time he knew what he was doing when he signed that [111] check?

A. I have to answer in the same way, counsel. He probably knew that he had to sign this check. It probably was handed to him by his attorney. But it does not have any bearing upon me. It does not have any bearing upon my opinion that I feel that the man was not competent, did not understand the procedure.

Q. Doctor, I did not ask you that quite. My

(Testimony of Dr. Walter Z. Baro.)

question is: Does the fact that Mr. Woynicz, as testified here, knew that the purpose of that check was the payment of \$350 which the contract required him to pay to Mr. Klaw—does the fact that he knew that have a bearing upon your opinion as an expert that at the time he signed that check he knew the purpose of the check?

A. It has no bearing on my opinion.

Q. And, in your opinion, it is a matter of no consequence whatever whether Mr. Woynicz comprehended and understood what that check was for, and that it was issued under the contract?

A. It has no consequence whatsoever.

Q. And it has no bearing at all, in your opinion?

A. No bearing at all on my opinion.

Q. I show you a check dated September 23, 1942, marked Plaintiff's Exhibit 7, check in the sum of \$150, and I ask you, Doctor, whether in your opinion as an expert the fact that [112] Mr. Woynicz knew at the time he issued that check that it represented three weekly installments of alimony at the rate of \$50.00 a week, from August 23, 1942, to September 23, 1942, and ask you whether the fact that Mr. Woynicz knew that the purpose of the check was to cover those three weekly installments from the date mentioned in the agreement, Plaintiff's Exhibit 1, to September 23, 1942, whether that has a bearing on your opinion as to whether or not at the time that check was issued Mr. Woynicz understood what the check was for?

(Testimony of Dr. Walter Z. Baro.)

A. It has no bearing on my opinion, even if he understood what it was for. And if I may be permitted, I would like to qualify my answer because, unfortunately, we cannot in psychiatry just answer yes or no.

Q. Doctor, the question is simply this: Does it have a bearing on your opinion as to whether or not he knew what the check was for?

A. It has no bearing on my opinion.

Q. Doctor, you recognize, of course, that persons suffering from reactive depression oftentimes continue to transact their regular business; isn't that so?

A. I think I stated that in the direct examination.

Q. And although a person is under what you have called a reactive depression, oftentimes they have complete competence to understand some types of transactions; isn't that so? [113]

A. Sometimes, which I explained before, which are automatic things which have been done regularly and which are told to them to do.

Q. Now I show you a few random checks, Dr. Baro. I show you a check dated September 6, 1943, issued by Mr. Woynicz to his wife, and ask you whether or not, in your opinion, Mr. Woynicz was competent to understand the purpose of that check?

A. I feel that he was competent to understand what he was doing.

Q. I show you a check dated October 12, 1942,

(Testimony of Dr. Walter Z. Baro.)

the next in order, and ask you the same question?

A. That is the same answer.

Q. I show you another check, dated October 5, 1942, and ask you the same question?

A. The same answer.

Mr. Weber: That is all.

The Court: Anything further with this witness?
Are you through?

Mr. Weber: No further questions.

Redirect Examination

By Mr. Riseley:

Q. Do you have any qualifications you wish to make of any of the answers you have given to Mr. Weber, Dr. Baro?

A. I would like to, if I am permitted. [114]

The Court: Well, go ahead, go ahead.

A. The situation with a mental patient is such, your Honor, that I happen to have, very often, patients sent to me who are mentally ill, but still they comprehend very well the value of money because it is their own money. There is one particular instance where a woman argued with me for about an hour about the fee of the examination. And I do not feel that that has any bearing on competency or incompetency. That is my qualification which I would like to make.

Mr. Riseley: No other questions.

Mr. Weber: No questions.

The Court: You are excused.

Mr. Riseley: The defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Weber: There are some depositions here of Mr. Zimmerman and Mr. Simon, and while I do not believe they—let me put it this way—in view of the fact that the conduct of the two attorneys in New York has been drawn into question, I would like to complete the record by offering their depositions.

The Court: In rebuttal of their evidence?

Mr. Weber: Yes.

The Court: You may do so.

Mr. Weber: I stated two; I meant three attorneys, Messrs. Klaw, Simon, and Zimmerman. [115]

Mr. Riseley: Your Honor, in qualification of his two depositions I would like permission to introduce into evidence——

The Court: He is offering his case now. Let us do this in some regular order.

Mr. Weber: I offer into evidence the deposition of J. Charles Zimmerman taken on November 18, 1949, pursuant to stipulation of counsel for both sides.

The Court: Admitted.

Mr. Weber: Does the court desire that I read it?

The Court: You can tell me what is in it, can't you?

Mr. Weber: Yes; I can summarize it if the court desires.

The Court: Counsel agree on it, that you may read a summary. If he does not, I shall have to go into it.

Mr. Weber: I can state parenthetically that the deposition of Mr. Zimmerman indicates, in substance, that there were protracted meetings with Mr. Woynicz; the contract was discussed in detail; a number of objections were made by Mr. Woynicz, including those mentioned by the witness, namely, the visitation privilege was stricken out on behalf of Mr. Woynicz.

Mr. Woynicz also objected to the provision with respect to the deadline for the removal from the premises.

Mr. Woynicz, after reading a draft of the contract, also insisted on the insertion of a clause in the contract permitting Robert to remove certain tools. [116]

In addition to that, the witness refers to other objections made by Mr. Woynicz. The witness also details—not “details”—there is some testimony concerning the discussions had with Mr. Woynicz with respect to his earnings. It was pointed out to him that the war time earnings which were then being earned by Mr. Woynicz had a bearing upon the issues before a court in fixing alimony. Those matters were pointed out to him.

There is a complete refutation of the testimony of Moscow trials or any other acts of misconduct or alleged misconduct which Mr. Woynicz places at the door of Mr. Zimmerman. And, in short, this is a rebuttal of the testimony of Mr. Woynicz concerning acts which transpired in the office of Mr.

Zimmerman, and also confirms the testimony of Mr. Woynicz so far as the completeness of the discussion is concerned and so far as the terms of the contract are concerned, and that Mr. Woynicz knew the contents of the contract and assented to it.

The Court: Do you understand that? Is that the contents of that deposition, in general?

Mr. Riseley: Well, that is in general, your Honor. But as to all three of the depositions——

The Court: Let us take up one at a time now. Open this deposition so we can see what is in it. Do you agree with him that that is a statement of that deposition?

Mr. Riseley: In general, as to the contents of it; yes. [117]

The Court: All right; it will be admitted. Now, what next?

The Clerk: Your Honor, do I understand that the deposition of J. Charles Zimmerman is admitted into evidence?

The Court: It is admitted.

The Clerk: That will be Plaintiff's Exhibit No. 11.

PLAINTIFF'S EXHIBIT No. 11

(Endorsed: Filed Feb. 2, 1950)

[Deposition of J. Charles Zimmerman taken Nov. 18, 1949. See page 223 to 249 of this printed record.]

The Court: File it then. What is the next one?

Mr. Weber: The deposition of the witness Joseph L. Simon discloses, in substance, that Mr. Simon, who was then the law partner of Mr. Zimmerman, was present at one or two of the meetings which took place in that office; that he heard the discussion of the contract; that Mr. Woynicz knew what was going on and knew that the parties were negotiating a settlement agreement which would determine his obligations to his wife.

He testifies further that he was present at the time Mr. Woynicz signed it and that he took Mr. Woynicz's signature, and that at the time the contract was signed Mr. Woynicz was under no restraint or disability whatsoever; that he appeared to know what was contained in the contract and knew what it was all about.

Mr. Riseley: With the qualification that the deposition of Mr. Simon conflicts in very material respects with the one of Mr. Zimmerman——

The Court: Well, let us find out. What does that deposition [118] disclose? That is what we are seeking now. You can argue conflicts when the time comes, if there are any. Does it disclose what he stated?

Mr. Riseley: I am not admitting that it is true, but I will say in general——

The Court: I know that. I understand that.

Mr. Riseley: Generally, there is testimony to that effect in the deposition.

The Court: I am asking you about this deposition. Can you understand me? I am asking you does the deposition disclose what he states this witness states? That is all we have now.

Mr. Riseley: Yes.

The Court: That is admitted, then.

The Clerk: That is Plaintiff's Exhibit No. 12 into evidence, the deposition of Mr. Simon.

PLAINTIFF'S EXHIBIT No. 12

(Endorsed: Filed Feb. 2, 1950)

[Deposition of Joseph L. Simon taken on behalf of the plaintiff Nov. 17, 1949. See pages 250 to 266 of this printed record.]

Mr. Weber: I offer into evidence the deposition of Jack Klaw, similarly taken on November 17, 1949.

The deposition of Mr. Klaw is to the following effect: He was the attorney for Mrs. Woynicz in the separation action, and he testifies that there were protracted negotiations covering many, many weeks between himself and Mr. Zimmerman. During that time Mr. Woynicz made a number of counter propositions. The matter of alimony was fought back and forth. It was the subject of considerable debate. [119]

He testifies further, in corroboration of Mr. Zimmerman, that the negotiations were in all respects proper and free of any restraint; and it also discloses the fact that Mr. Woynicz evidenced familiarity with what was going on, and that in the contract he made a number of objections to specific clauses.

The Court: What do you say to that, about his statement?

Mr. Riseley: Well, that is the substance of it.

The Court: It will be admitted.

The Clerk: That is Plaintiff's Exhibit No. 13, the deposition of Jack Klaw, into evidence.

PLAINTIFF'S EXHIBIT No. 13

(Endorsed: Filed Feb. 2, 1950)

[Deposition of Jack Klaw taken on behalf of the plaintiff, Nov. 17, 1949. See pages 267 to 280 of this printed record.]

The Court: Any further rebuttal?

Mr. Weber: Just one more question of Mr. Woynicz. Would you take the stand on one point? No further rebuttal. That is all.

The Court: No further. He said he does not want it. Anything further from you?

Mr. Riseley: By way of impeachment of one of the depositions, your Honor, a letter that I would like to introduce.

The Court: Submit it to counsel.

Mr. Weber: No objection.

The Court: It will be admitted. What does that show? Tell me what is in that letter.

Mr. Riseley: This is a letter from Attorney Zimmerman to Leonard Woynicz and admits that in the course—— [120]

Mr. Weber: May I suggest the letter be read? It is not too long, your Honor.

The Court: You may read it. Go ahead.

Mr. Riseley: (Reading as follows.)

DEFENDANT'S EXHIBIT A

“Law Offices
Zimmerman and Simon
1101 National City Bank Building,
17 East 42nd Street,
New York.

“December 9, 1942

“Mr. Leonard Woynicz,
“c/o N. Y. Thread Grinding Corp.,
“237 Lafayette Street,
“New York, N. Y.

“Dear Mr. Woynicz:

“Your letter dated December 4th in which you state that my bill of December 1st is an additional bill and that it does not make sense, came to me as a great surprise.

“In the course of your trying work it is possible for events to escape your memory. I will, therefore, recall to you what happened while you sat at my desk in my office at the time I delivered to you the signed papers last September. I had explained to you that I felt that the services I had rendered [121] entitled me to a payment far in excess of the sum of \$500.00. At the time we agreed that \$500.00 was the amount that you would pay and I would accept. Do you not recall that you took from your pocket your bank book and showed me that because of the heavy payments you were called upon to make at that time that your balance was not very large? Do you not recall that you told me that you were purchasing a home for your children in Long Island and that you would be called upon to make a substantial payment for that purpose and that you suggested that you would give me \$400.00 at the time and the balance of \$100.00 a little later when you had replenished your bank account? I freely agreed with you and did not disturb you until November. At that time I wrote you asking you to send me the balance and when I did not get a reply to my letter of November 17 when I wrote you about the ring and the Christmas Tree ornament, I waited until the end of the month and then sent my bill in the regular course on December 1st. Does this not refresh your memory as to what happened at my office when you promised to send me the remaining \$100.00 at a later date?

“I remember, Mr. Woynicz, how often you stated

to me that money is not everything and that once an agreement is made a man should live up to it. I also [122] remember that I told you at the very start that I would never quarrel with you about fees. If this letter brings back to your memory something which you have overlooked, I am sure that I may expect your check by return mail.

“Cordially yours,

“/s/ J. CHAS. ZIMMERMAN.”

The Court: That is admitted. Go ahead.

The Clerk: Defendant's Exhibit A in evidence.

[Defendant's Exhibit A—See foregoing letter read by Mr. Riseley.]

Mr. Riseley: Nothing further, your Honor.

The Court: Both sides rest?

Mr. Weber: Yes.

The Court: You may proceed with the argument, if you want to argue.

Mr. Weber: May it please the court, I propose to make this a very brief argument.

The Court: Very well, go ahead.

Mr. Weber: Does the court desire argument at all?

The Court: If you want to argue, I am giving you the opportunity, both of you. If you want to, go ahead; if you do not, say so.

Opening Argument on Behalf of Plaintiff

By Mr. Weber:

Here is the situation where a man has testified that he knows he is being sued in a separation action, knows alimony [123] is requested, knows counsel fees are requested, calls up the attorney for the wife, consults one lawyer and then his partner refers him to a friend of his, Mr. Zimmerman. He goes to Mr. Zimmerman's office and in the course of those negotiations the contract is explained to him, as Mr. Woynicz acknowledged. He insists on certain changes in it after reading a draft.

The Court: By contract what do you mean?

Mr. Weber: The separation agreement.

The Court: The separation agreement. Did they enter into a decree of separation?

Mr. Weber: No. The wife, thereafter, in reliance on that contract——

The Court: Sued for divorce?

Mr. Weber: She sued for separation, and in reliance upon it, she dropped the action and has never resumed the action. In other words, the agreement required or acknowledged that the separation action had been discontinued by the wife and that this agreement was to supersede that action.

The Court: They are not divorced, then?

Mr. Weber: Well, we have this involvement in Florida: In 1947, when Mr. Woynicz went there, he went there in January of 1947, and after a 90-day residence period he filed action for divorce in May of 1947, in Florida, and she never appeared or

defended that action and service was never made personally [124] upon her in Florida. A service was made by publication, and in that manner a divorce was obtained, but it has no effect upon this separation agreement.

The Court: The divorce decree did not refer to the separation agreement?

Mr. Weber: No; it did not.

The Court: Go ahead. I understand.

Mr. Weber: In the course of these visits to Mr. Zimmerman's office, your Honor will recall that the witness Woynicz testified that he himself pointed out that he did not want his wife to have visitation privileges as requested in the agreement and insisted that that provision be removed.

He also asked for an extension of time within which to remove certain personal property from the premises.

There was also his insistence on the provision with respect to the removal of tools from the premises.

The testimony of Woynicz was that he plainly knew what the \$350 was for. He acknowledged that he knew that the \$350 was in payment to Mr. Klaw for his counsel fees.

He testified further that he knew that the \$150 represented three installments of the alimony called for by the separation agreement, from August 23, 1942, to September 23, 1942.

In addition to that, he testified further that he knew that the question of alimony was being involved. All this, your Honor, on the testimony of

Mr. Woynicz, which appears [125] without controversy.

In addition to that, we have the depositions, of course, of Mr. Zimmerman, Mr. Simon, and Mr. Klaw indicating the complex and protracted nature of the negotiations during which time Mr. Woynicz knew what was going on.

Of course, we all know that the ultimate test to be applied is not whether a person was in an extreme state of nervousness, or had lapses of memory, but, as the cases prescribe, the important test is: Did the defendant know that he was entering into a separation agreement. And I think the cases uniformly hold that many persons under different forms of stress, mental and physical, have complete competence to enter into agreements as long as they understand and know the nature of the transaction that they are entering into. And in view of the uncontradicted testimony from the defendant himself, we have an indication that he fully was aware of what was going on, and that he was entering into a contract of separation with his wife and so understood it.

Quite apart from that, we have an additional feature to this case that removes it, I think, from any area of controversy. We have a series of payments under the contract for upwards of four years. And I have the authorities here—I need not dwell upon it—that where there is any act on the part of a defendant indicating his compliance with the provisions of a contract, after he knows of the existence

of the [126] contract and after the alleged disability is removed—any act on his part in compliance therewith is in effect a ratification of the agreement.

And there is no controversy here whatever, and corroborated by his daughter, that he made these payments for over four years. He knew that they were called for by the separation agreement and issued his checks accordingly.

And so, in our view, as a matter of law the defendant cannot be heard to consent by silence and then, at a convenient time, four years later, seek to repudiate the agreement.

Argument on Behalf of Defendant

By Mr. Riseley:

Your Honor, answering his last point first, the sad thing about a man's incompetency is that he very often does not know about it at the time; he does not discover it himself. You go into any mental institution and half of the inmates will pursue you and say: "Get me out of here. I am not crazy." We have all had that happen in the practice of law.

And so far as the payments for four years were made, he did send a letter when he began to recover in 1947, through his attorneys, repudiating the agreement on the ground it was improperly procured and other grounds, and the letter counsel has submitted into evidence.

So there are numerous cases that an insane man cannot be further estopped by his own acts. *Dexter v. Hall*, a Supreme Court case that I cite in my

trial brief, is perhaps the leading authority on that.

In the separation agreement itself, I might say in passing, as I say in the trial brief, there is a question of public policy as to its terms, in that it purportedly forbids the wife from bringing suit so long as he kept up with it, and mortgaged her redress to the courts as far as divorce action is concerned; in other words, would allow the defendant to live in adultery. But that is merely a point in passing.

An ordinary separation agreement has to be fairly entered into, and without duress or mistake or fraud or anything. It is different from any ordinary contract. It is a special kind of contract.

I cited in my trial brief a case of the United States Supreme Court where they mention the New York Rule that a separation agreement is a special kind of contract, and they cite New York cases on it in that case, that the plaintiff has to show that it was fair under all the circumstances when it was entered into.

And I submit here, if there ever was an agreement that was not fairly entered into, because of the mental condition and all of the circumstances surrounding the defendant at that time, this was such an agreement, if there ever was one.

You have heard the testimony as to what his mental state was and you have heard the opinion of the expert psychiatrist, [128] a man who has studied it all his life. I could not hope to understand psychiatry. I have not had the learning and I can't discuss it.

That is the whole trouble with this question of incompetency. And it is the same thing that we argued when we argued the motion for summary judgment, is that the things that a man does who is incompetent are not reasonable, like making the payments. If he thought he could not make them, is it reasonable to make them? Well, we cannot consider that, because what a man thinks when he is incompetent is not reasonable.

The test is not only just that he knew what he was doing, but did he know what he was doing and the consequence of his act. And we have adequate testimony, it seems to me, to establish the fact that he did not know the consequences of his act when he entered into this agreement, and did not recover until late in 1947.

I might clarify a point that counsel made on the Florida divorce action. That action did not adjudicate the duty of the defendant to support his wife. He still has that duty. In other words, that was not terminated by this agreement or the failure of this agreement will not mean that he won't have to support his wife. He will still have that duty to support her, but the question is as to how much. And they have not shown that this is a fair agreement, and certainly under the [129] circumstances it is not a fair agreement on the amounts that are called for to be paid under it and she get the house and all the terms of it.

It is on its face an unfair agreement, particularly when coupled with his testimony as to the mental

condition of the defendant at the time he entered into it.

I have nothing further. Thank you, your Honor.

The Court: Any reply?

Closing Argument of Plaintiff

By Mr. Weber:

Just briefly replying, if I may, it is very interesting to note that after the four-year lapse, when the defendant elected to repudiate the agreement, his attorneys sent a letter to Mrs. Woynicz and one to him, I suppose, that if there were any question about his competency at the time he signed the agreement, he certainly would have asserted it in that letter of repudiation. And it is interesting to note that in a letter of repudiation that his Florida lawyers, who were representing him in a divorce action, in a letter that they sent to Mrs. Woynicz, they do not say anything at all about mental incompetency on the part of Mr. Woynicz at the time he signed the agreement. And it strikes me that there certainly would have been such claim in that letter of repudiation by his attorneys if there were any legal basis for the repudiation of the agreement, as attempted here, on the ground of [130] the mental incompetency of Mr. Woynicz.

So far as the separation agreement is concerned, I do not know whether counsel expects this court to try the separation action. As we understand it, the contract entered into between the parties is like any other contract.

The issue before this court is whether or not he knew what he was signing, and the fact that other amounts might have been agreed upon does not alter the binding effect of a contract, whether it be for \$50.00 a week or for some other amount.

And in this connection I desire to point out to the court that he has admitted that he paid nothing, nothing at all to his wife since October, 1949. And here is a man who gets his wife to sign a separation agreement, pays on it for four years, then goes down to Florida and gets an ex parte divorce, if I can coin a phrase, and then discontinues payments to his wife. She is in New York. And he comes up here and he says: "Well, I still recognize she has a right to support, but I do not want to recognize this agreement."

The Court: This case involves the competency of the defendant as at the time that the separation agreement was executed between him and his wife.

It seems that the evidence discloses very clearly to the court that he had knowledge and knew what he was doing; he was perfectly competent at the time he signed this separation agreement. [131]

His conduct, his actions and activities in life from that time on conclusively show that he had knowledge and was perfectly competent in signing the separation agreement. Every act in his life for those four years—president of a corporation, been signing checks under this separation agreement, recognizing its validity—he knew what he was doing and knew what had been done.

Now to come in at this late date, four years, afterwards, functioning under that agreement, and ask the court to say he was incompetent at that time, when the evidence here does not show he was incompetent at all, would be manifestly an injustice done.

Here we have a valid and subsisting and existing separation agreement executed between these parties, and they both knew what they were doing. Not only that, but they were advised by counsel. They both had lawyers and negotiated. Everything was explained to him. He was not taken by surprise.

The Court: I have reached the conclusion, and it is very clear to me, without any question under this evidence, that the cause of action alleged in this complaint is established and the findings for the plaintiff as prayed for in the complaint.

Now, what is the next case?

Mr. Riseley: Findings?

The Court: Yes, I say, unless you want to waive them. [132]

Mr. Riseley: No.

The Court: I say findings will be prepared, and present a decree in accordance with the rules of the court, unless you waive findings.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 25th day of April, A.D., 1950.

/s/ ALBERT H. BARGION,
Official Reporter.

Friday, March 24, 1950

The Clerk: Shall I call the calendar, your Honor?

The Court: Yes, call the case.

The Clerk: No. 9324-PH-Civil, Alexandra Woynicz v. Leonard Woynicz, motion of defendant to amend findings and to make findings more certain, and objections to findings. Also, motion of defendant for new trial.

My record shows Mr. Daniel A. Weber present for the plaintiff, and Mr. Jerry B. Riseley for the defendant.

The Court: You may proceed. You have two motions; one, to make findings more definite and to object to the findings. We will take that first.

Mr. Riseley: If it please the court: I think if I can argue my motion for a new trial first, it will make it more definite just what my objections are to the findings.

The Court: We will get at it. Why can't we have the objections to the findings first, and then your motion for a new trial will follow. Let's hear the motion objecting to the proposed findings first.

Mr. Riseley: All right, your Honor. As I say in my motion, the findings are objected to because they are uncertain, and in order to tell what was found you have to look at the complaint. In essence, all that is said is that all of the allegations of the plaintiff's complaint are true [135] and that the defenses of the defendant are without merit, and actually that isn't a finding at all. A judgment for the plaintiff tells you the same thing.

He also ignores the construction of the agreement that is sued on, and I think I can go into that now, as to why this agreement has to be construed. I intended to take this up with the motion for the new trial.

The Court: You can take it up any way you want to. I am not trying to regulate your argument, but I am saying that the motions ought to be taken up separately.

Mr. Riseley: Well, there is a serious public policy question, in fact, two of them, in this agreement. That is Exhibit A to the complaint. I don't know if it was moved to the amended complaint or not. It was introduced in evidence, and here are the two paragraphs that are in question:

"Eighth: If the Husband defaults in the due performance of any of the terms, conditions, and covenants of this agreement on his part to be per-

formed, the Wife shall have the right to bring an action either for a legal separation or for support and maintenance, or for both, and in any such action she shall have the right to ask for and obtain temporary and permanent alimony and counsel fees.

“Ninth: Unless terminated as in paragraph ‘First’ [136] aforesaid, this agreement shall survive any order for the payment of alimony,”—

and paragraph “First” terminated it on the death of the wife, or in case of remarriage, or granting of a divorce in favor of the husband, or repudiation, or death of the husband.

The Court: It seems after looking over the findings that the objections were due on the 20th, and so I signed them. So your objections to the findings are late, but the motion for a new trial is in time. As to the findings, I settled them on the 20th.

Mr. Riseley: I filed my objections here.

The Court: Before the 20th?

Mr. Riseley: Yes.

The Court: Well, unless you did, it seems that the time for the objections to findings has gone by.

Mr. Riseley: I believe I had a letter from the clerk telling me the motion had been filed as of March 17th. Here is a letter I received from Mr. Francis E. Cross. It says in the postscript:

“The motion of defendant to amend findings and to make findings more certain and objections to findings, filed on March 17th, 1950, and noticed for April 3rd, 1950, is likewise advanced for hearing to Friday, March 24th, 1950, at 10:00 A. M.” [137]

The Court: Did you file any objections to the findings before the 20th of the month? Does the record show that, Mr. Clerk?

The Clerk: I am looking for the file, your Honor.

The Court: That is what I am trying to get at. You see, if you file them within five days, according to the rules, then they were subject to being settled on the 20th.

Mr. Riseley: This one is dated March 17th. Here is my forwarding letter of March 16th.

The Court: Did you file any objections to the findings before the 20th? Is there any record here showing it?

Mr. Riseley: I put them in the mail and the clerk got them.

The Clerk: May I see that letter, Mr. Riseley, please?

(The letter was handed to the clerk.)

The Court: Because we would have to resettle these findings if that isn't correct. That seems to be the record here before me, as to the findings, I mean. We will dispose of that motion first, if it has not come in too late.

The Clerk: This is what I am after, your Honor. Is this the document referred to there?

Mr. Riseley: Yes, filed March 17th.

The Clerk: This document was filed on March 17th in the clerk's office, your Honor, and it was noticed for hearing for April 3rd. Then because of your going to be away at [138] that time, it was

advanced for hearing until today, so the findings were filed in time.

The Court: The findings were, but were the objections?

The Clerk: I think the objections were included with the motion.

Mr. Weber: Perhaps I can clarify one or two points, your Honor. The proposed findings, as will appear from the affidavit of service, were served on March 10th. On March 17th apparently Mr. Riseley did not file objections as such, but he filed a motion to amend findings, and he is apparently referring to that motion as objections. But in actuality no objections as such were filed within five days.

The Court: The rules require that, you see, and you have to file objections within five days. Now, I understand the record shows——

Mr. Weber: The affidavit shows they were served on the 10th of March, and assuming we allow a half-day for mail, the fifth day would expire on the 16th day of March, and no objections, as such, have been filed.

The Court: These findings were not settled by me until the 20th.

Mr. Weber: That is correct.

The Court: That is the first question before me, whether the findings haven't been settled, for the reason that you didn't get in within the five days your objections. [139]

Mr. Riseley: I mailed them on the 16th, but they are filed when they get to the clerk's office, which is the 17th.

The Court: That is the confusion, as to whether or not they reached there.

Mr. Riseley: I will object also that the findings were not properly served. That is why I did not get them. They were not mailed to my address of record. They were mailed to this other attorney's office, and he has been formally substituted out. I have the envelopes showing that.

The Court: I will hear the nature of your objections to the findings, first, and we will redate this settlement on the 20th. I will hear you, so that you will then be in court, and I will give you the benefit of all the doubt.

Mr. Riseley: The findings have never been served on me.

The Court: Never been served?

Mr. Riseley: Technically so, because they were mailed to 417 South Hill, and my address of record is 215 West 7th Street.

The Court: We will go ahead and hear your motion and objections to the findings, and I will have to redate this, that they have been settled. We will hear that first and give you an opportunity in court to object to the findings, and we will take up later the motion as to the new trial. There is some confusion as to this settlement of mine on the 20th, and it will be vacated, and we will try that first. [140] I think that is fair, and that gives you all of

the opportunity you have under the rules. So you continue to object to the findings?

Mr. Riseley: I was making the point that it would be necessary to make findings as to the construction and interpretation of this agreement. Paragraph Eighth said that if the husband defaults at any time the wife shall have a right to bring an action for legal separation or for support and maintenance, or both, if he defaults. Then Ninth says:

“Unless terminated as in paragraph ‘First’ aforesaid, this agreement shall survive any order for the payment of alimony, temporary or permanent, which may be made in any action which hereafter may be instituted between the parties for separation or divorce, and/or any interlocutory or final judgment or decree in such action granting or denying such alimony, and/or any order modifying such order, judgment or decree in such action, and this agreement shall not be merged in any of the aforementioned orders, judgments or decrees, but shall survive the same.”

In other words, this agreement, by its terms, was not capable of being merged or put into a decree. But if you have a separation agreement, it is not a true agreement because in a true separation agreement the court can look at it [141] at the time it comes up and do a lot of things with it. But this is different. They specifically hold this agreement out. Now, what is the effect of these two paragraphs? Now, under Eighth, if the husband defaults

in the due performance, the wife can have an action to bring a divorce. We can construe that two ways. It must mean something. Does it mean that so long as he pays that \$200 per month she can't bring suit for divorce? If that is a reasonable interpretation of paragraph Eighth, of course the whole statement would be contrary to public policy, because he would be buying in effect the right to commit adultery, the right to violate any of the terms of their marriage. And it is contrary to the laws of the State of New York in common law, in that the parties cannot contract away any of the incidents of the marriage. In other words, you cannot contract away your right to sue for a divorce, any more than you can contract to allow your husband to commit adultery and not complain about it.

In this case, under the facts that we saw at the trial, there were some charges that the husband was running around. If that was the meaning of this paragraph Eighth, if that is the reasonable interpretation, then the agreement would be contrary to public policy, and I have numerous authorities on that. I believe I cited some in the trial memorandum.

Now, if we look at it another way and say, well, this [142] doesn't prevent the wife from bringing suit for divorce, that still doesn't clear our agreement, because we run into this trouble with this paragraph Ninth: This agreement is not a separation agreement, it is a bonus agreement. Now, no matter what the wife does, she can go to court and

can sue for divorce, and separation, and the court can award her any amount it sees fit. In addition to that, if she does go, is she to get this bonus of \$50 a week? The effect of this agreement is that it will pay the wife a bonus of \$50 a week, as well as all the other things she got in the agreement to get a divorce. Actually, it amounts to an agreement for divorce.

Now, I have a case here that almost ran into that same trouble. It came so close to doing just what this agreement does that the court almost held it was bad. That is *Trust Company of America v. Nash*, 98 N. Y. Supp. 734. In this case there was a separation agreement which required the husband to pay the wife \$50 per month so long as she should not remarry, and provided that in case the wife should obtain an absolute divorce the provision should continue notwithstanding any alimony awarded to the wife. Now, if it had just gone that far, the agreement would have been bad, but in this agreement it said: "Provided that the decree of divorce shall provide for no greater alimony than \$150 per month dependent upon the happening of the same events." [143]

Now, the court says:

"If this agreement could fairly and reasonably be construed as offering an inducement and advantage to the wife if she would procure a divorce from her husband, it would clearly be contrary to public policy and void." Citing cases.

They do not construe it that way because they say

the saving feature in it is the clause providing that the decree of divorce shall provide for no greater alimony than \$150 per month, and with that limitation on it, they say that kept it from being a bonus agreement, because she could in no event ask for more than \$150 per month, and she might receive less. So it wasn't like this agreement.

In this agreement she could ask for any amount of money, and you couldn't even take into consideration the \$200 a month that she was getting under this agreement. That put this agreement beyond the reach of the court. That is why it isn't a separation agreement. They contracted away all the jurisdiction of the court over this agreement. For that reason I feel this agreement here is void, as a matter of law, whichever way you interpret it. If you interpret it that she can't bring a suit for divorce, it was without their powers to make such a contract. If you interpret it that she can bring a suit for divorce, under paragraph Ninth it puts the agreement in the state that it actually amounts to paying her [144] a bonus to get a divorce because she has this money free and clear.

Section 51 of the New York Domestic Relations Law, which is merely a modification of the common law, provides that a husband and wife cannot contract to alter or do away with the marriage. That was considered in *Garlock v. Garlock*, 279 N. Y. 337.

If we construe this paragraph Eighth that she is not to get a divorce, it amounts to a corrupt con-

sent by the wife to the commission of acts of the husband which might be considered criminal. That is considered in *Levine v. Klein*, 65 Misc. N. Y. 498.

In other words, speaking on the findings now, it seems to me that some findings should be made as to the court's interpretation of this agreement, and as to the effect of paragraph Eighth and paragraph Ninth, and whether paragraph Ninth is, in effect, as the defendant contends, a bonus agreement to induce a separation.

You can't have that kind of an agreement. It can't be a separation agreement because it can never be merged into a divorce decree.

And there is another thing. You see, your Honor, if we take the findings as they are, it says in the complaint that this contract was entered into for her sole support and maintenance. If we find that to be true,—well, it isn't [145] because she had this contention, that under the one construction of the agreement this had nothing to do with the separation, and nothing to do with her support and maintenance. She was to go to court and get what she could there, and there was almost an implied provision that the husband would default. But, in any event, the court was to have no power over this agreement. This was separate. So it isn't a separation agreement, and any finding that this was for the wife's support and maintenance would be open to that objection.

Now, by the same token, I believe it is alleged

in the complaint that the defendant was a resident of the State of California. I think that the defendant testified that he was a resident of Florida, and I don't believe there was ever any other evidence offered on the matter. We have never admitted that the defendant was a resident of California. We pleaded in the answer that he was a resident of Florida, but that didn't make any difference anyway, because he could be sued wherever they found him, and they found him out here.

So I think the findings should be changed to show he is a resident of Florida and not of California.

Then I would like for a moment to go into the findings as to the mental state of this defendant. I think we got into a little confusion at the start of the trial on that point, in which I intended to outline to the court, but I [146] didn't, because the court indicated to me, so I thought, that we were in agreement on the subject of mental capacity,—the two types of mental incapacity. If you have a man that is entirely without understanding, that is one type; and then, again, if you have a man of unsound mind. Now, that is a common law rule, and in California we have that put into the Code. There are two Code sections on that, and I will find it here in a minute. It is California Civil Code, Section 38, which provides:

“A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for (1) his support or (2) the support of his family.”

Then they follow that with Section 39, which provides:

“A conveyance or other contract of person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code.”

That is the two types.

Now, we all heard the testimony here, and I don't think any of us can contend that the defendant was entirely without understanding. That would be a man, practically, at least at [147]that moment, an idiot, who didn't know where he was or what was going on around him at the time. But he could be of unsound mind.

We heard a lot of testimony as to the state of his health, and the worry he was going through, the fact that he had been through this severe operation, the fact that he was forgetful, and a multitude of other things. We heard Dr. Baro's expert psychiatric opinion on his capacity.

I have seen an awful lot of incapacity, your Honor. By way of analogy, I think we could find an instance of it in the Bible, and we have seen it in stories, common to all of us. I have seen a battalion commander in the field of unsound mind carrying out his duties, and running a whole battalion of 500 men. I have read instances where that has gone on for weeks, and nobody knew there was anything wrong until some junior officer happened to hear him mention that something was there that wasn't there, and then they would all begin to

talk to themselves and begin to wonder what was the matter with the old man. They began to get his orders and found they were a little bit off. We had one regional commander who took away all his equipment in the field, but still commanded a regiment for a few months afterwards, until he committed suicide, or something like that.

That is just like this man, who was president of a corporation. He was able to command his outfit, but, as Dr. [148] Baro testified, he had this suicide complex, and actually he was of unsound mind.

I have here the case of *Carr v. Sacramento C. & P. Co.*, 35 Cal. App. 439. I didn't go far to look for this case. There are probably a lot of other cases on this matter of unsound mind. Here are some of the things the court considered in finding him of unsound mind in this case. A man had been injured, and they came around and got from him a release, and he set up that when the release was pleaded that when he had executed it he had been of unsound mind. It seems to me looking at this case that the evidence was much weaker than Mr. Woynicz's. Before I start on it, I will say that where you do have a case of unsound mind, as distinguished from total misunderstanding, you have to have a necessity for rescission. I think we have that in the Woynicz case, as they had it in this case, and I will take that up a little bit later. But this man's physician testified that the plaintiff was suffering from "traumatic hysteria, bordering on melancholia; that he complained of disorders in

digestion, did not sleep well, did not care for social intercourse with friends or relatives, was depressed, had financial worries, did not seem to carry on conversation to any extent, 'on account of his injury which resulted in more or less depression—traumatic hysteria; for that reason I do not think that the man was in a position to judge the result of the [149] form of this contract'; his nervous condition had some effect upon his will power; 'his mental condition was certainly abnormal' * * *"

That is not as strong expert testimony as Dr. Baro gave.

Then his wife testified that "normally her husband was a jolly, healthy, sociable man, but predisposed to nervous disorder; 'at times he was almost bordering on insanity'; just before the accident his mental condition was good; shortly after leaving the hospital the first time and before the release was given he became depressed and declined to converse with her. He would shun his neighbors, whom he had previously been glad to see; he took no interest in home matters and neglected his personal appearance, 'he was nervous, forgetful, stupid, and dull, and would hardly sleep. At the time the release was executed he was morbid and melancholy and did not seem to be in a fit condition to transact business of any importance'."

What I am getting at is this: We turn over here in this case and we go into lengthy evidence of the discussions that they had with this man of unsound mind, when they were getting this release. He re-

membered practically everything. He remembers an awful lot more than Mr. Woynicz remembers, even with the help of the learned counsel for the plaintiff on cross-examination. Here he asked what time it was, and he remembered the exact words.

"... he says, 'In no event do we allow more than One Hundred Dollars for hospital and medical fees',"—this is the plaintiff talking—"and said that I was getting all that I was entitled to under the Act, which was twelve weeks, he said, sixty-five per cent of my wages for twelve weeks was all I was entitled to under the Act. He said—he took out his watch and looked at it—he said he would have to catch the train for San Francisco at 3:30, he says to hurry, 'Do you want to take that or do you want to sue the company?' 'Now,' he says, 'if you sue the company, it will be a long drawn-out proposition; aside from that we have a signed statement from the foreman that it was entirely your own fault you got hurt'."

This man remembers all that and yet the court found that he was of unsound mind at the time that he executed that release.

Now, as regards the findings, I notice when your Honor gave the decision he mentioned about this man going for four years and making these payments before saying anything about it, and I think that is in the findings themselves. Well, that, by itself, doesn't mean anything unless the court held that Mr. Woynicz was of unsound mind at the time he executed [151] this agreement and recovered it

sometime between 1942 and 1947. There was no evidence on that given.

Our testimony that we offered, and the only testimony that was offered, was that the state of his mind remained the same between 1942 and the latter part of 1947, when Dr. Baro said he began to recover. In March, 1947, this letter of rescission was written, in which he disaffirmed the contract, he rescinded it. There was a rescission between the parties, and we all understand rescission and we know that you can have that type of a rescission. I don't know that I cited authorities on it in my trial brief, but it is a matter of general law. Assuming he was of unsound mind in 1942, as distinguished from being totally without understanding, and assuming this condition continued until 1947, and assuming at that time his attorney sent this letter to the plaintiff, saying, "We repudiate this agreement because it was wrongfully obtained," I say then that, as a matter of law, there was a rescission of the agreement and that the defendant isn't liable on it.

So we have got to make findings in here because of the making of payments over that period. If he is still of unsound mind, it can't make any difference. The burden rests on them, your Honor, to establish this lucid interval.

I think I have a case on that, one that I cited in my trial brief. But, as a matter of law, on the evidence there [152] is a shifting of the burden. When you get evidence in that they are dealing with a man

who had an unsound mind, once you come up to that, there is a burden that shifts to the other party to show that the transaction was fair and reasonable and was executed within a lucid interval, and that there wasn't any fraud or undue influence used. I am looking now at *Aikens v. Roberts*, which is 164 N. Y. Supp. 502, at page 504:

“Defendants grantor, having been shown to be of unsound mind,”—and they discussed the evidence—“the burden was cast upon the defendants of proving that their grantor had lucid intervals, and that the transactions complained of were executed during those periods.”

Citing many authorities, one of which is *Greenleaf on Evidence*.

——“that the transactions were fair, open, voluntary, and well understood, with adequate consideration;”—Citing authorities—“and that the acts of their grantor were normal acts and conduct;”—Citing authorities—“and that no fraud or undue influence was used.”

Citing many authorities, and citing *Pomeroy on Equity Jurisdiction*.

“The defendants have not met the burden cast upon [153] them by the law where transactions are had between parties who do not deal on terms of mental equality.”

I feel here the defendant made this *prima facie* showing; that he was of unsound mind, and that the plaintiff's evidence that was introduced was not sufficient to overcome any of that showing, so that

it would be necessary for the court to make findings on that point. Then I have said in my objections to the findings that the court didn't make any finding as to what effect the defendant's letter of rescission had. It was either a letter of rescission or not.

Now, we didn't plead that letter, your Honor. We left that to the plaintiff to plead. She had to plead it to come within the terms of the agreement, and when counsel pleaded it, and when he did plead it, he pleaded the rescission, because we had always contended that the unsound mind continued during this period. And I don't think that he was misled about our not pleading that letter because the letter was sent to him, and he pleaded it. He relied upon this letter to excuse the plaintiff from waiving notice of the divorce, which was a condition precedent to the suit, according to the terms of the contract, so that some findings are going to have to be made on that, if it did excuse him from a notice, or whether it was actually a rescission.

Then the court is going to have to make findings as to [154] whether the defendant recovered his capacity between 1942 and 1947, at the time he made these payments. Then no finding is made upon the essential point of plaintiff's recovery, that the agreement in all respects was fair and reasonable, in view of all the circumstances; entered into without coercion, and with full knowledge of all the circumstances, and so on. And that is necessary in the findings because of this shifting of the burden. When we introduced this great amount of evidence as to the unsound mind, the burden, according to

these authorities, and I believe it followed Wigmore on Evidence, was shifted over on the other side, to come back to show that the man was of sound mind when he executed that. I don't believe there is enough evidence on it.

That will conclude my argument as to the findings—to amend the findings and objections to the findings.

The Court: We will hear from counsel for the other side. Then we will take up the other motion, after we get through with the objections to the findings.

Mr. Weber: May it please the court: A man who was the president of a corporation with 150 employees is sued for separation by his wife in the summer of 1942. He goes to a lawyer who participates in extended negotiations with his wife's lawyer covering a period of about two months; persuades his wife to drop the separation action and not to go [155] out and get a divorce, which is the opposite of what counsel is arguing, and in the course of those extended negotiations, participates in the negotiations and consults on changes in the agreement, insists vehemently on certain custody provisions, argues for an extension of time to remove certain tools from a certain location, and testified he knew exactly what the \$50 a week was for, testified, further, he knew what the \$350 was for that he gave the wife's lawyer, knew what the \$150 was for, representing three weekly payments, and testified, further, his daughter—corroborated by his daughter, by the way—that she, too, partici-

pated in negotiations, represented at all times, by an attorney. Thereafter, he makes payments on the agreement for upwards of four years. And he was on the stand and admitted it. He was shown a number of checks and asked, "Do you know what this was for?" His daughter testified the checks were paid because of that separation agreement. It goes on for four years. He goes down to Florida in 1947, and during the period of alleged insanity was sane enough to get a divorce from his wife of twenty-six years' standing. During that period he has a lawyer and sends a letter of rescission repudiating the agreement, after paying on it for four years. Never is a word said about mental incompetence. Then he comes out to California and he says to this court, after not making a single payment since 1948, he says the agreement [156] was not good because, "No. 1, I was insane; No. 2, it is illegal."

I would like now to say a word about the question of legality. Of course, the agreement does nothing of the kind that Mr. Riseley talks about. It does not encourage divorce. It does the opposite. The purpose of the agreement was to preclude a severance of the marital ties, and that was the purpose, and on the strength of it the separation agreement was drawn up.

We know that if two parties enter into an agreement and the inducement is for the other person to get a divorce, that is the object to be brought about, of course, that could be held to be unenforcible. But this does nothing of the sort. It does the reverse.

This agreement is identical with thousands of separation agreements of the conventional type, where there is an agreement that this contractual provision shall abide and shall survive any other award. And the implication is very simple. A court can still make whatever award it wants to if a divorce action is brought. It is meant that the parties were left to their contractual remedies. And that is done elsewhere and everywhere where there is an award of money in lieu of division of property. That contains this conventional provision. It does not oust the court of making an award as the circumstances of the parties require. It says: Then you shall be left to [157] your contractual remedies, which is perfectly legal.

It would be a waste of time to cite all of the hundreds of cases where these provisions are uniformly upheld.

So far as the question of residence is concerned, Mr. Woynicz was asked where he lived, and he said, "232 West Imperial Highway." He said that he is living there with the woman whom he married after this alleged divorce in Florida. And he was also asked what the plaintiff's address was, and he indicated her address at the Brooklyn address where she has been living for years, and it is the very property in which she got a life interest in the separation agreement. So the question of jurisdiction now comes rather odd and belated, and, in our view, is entirely unfounded, particularly, in view of the trial brief of the defendant, where he says:

“The Ninth Defense, that defendant is a resident of Florida, is abandoned, without admitting that defendant is a resident of California, or is not a resident of Florida.”

He just abandons the defense. And quite apart from that, he was asked where he lived, and he said so, and there was no contrary evidence on the issue of residence.

Now, so far as the findings are concerned, I think the court will get the conviction that it is as simple and clean-cut a setting of findings as one would like to have. There is [158] nothing complicated, there is nothing involved, and nothing fragmentary about it. The findings, while they do not cover each and every allegation of the complaint, there is no purpose in adding a number more pages to it if by a simple incorporation by reference we can cover it. Anyone can readily know what the court has found when there is a simple averment that everything contained in certain designated paragraphs of the complaint are true. That is clear and precise. There is no point in adding five more pages, or four more pages, to recite the identical allegations of the complaint which the court finds to be true, and in most of the cases that I have seen passing through the courts here, that practice is uniformly followed, and in several decisions has been specifically sanctioned. There is no point in extending them.

On the issue of incompetence, what could be more simple and more concise than the following averment:

“That at the time of the execution of the agreement dated September 22, 1942, which agreement is specified in the amended and supplemental complaint, the defendant was mentally competent to enter into said agreement and fully understood and comprehended the nature and purpose of said transaction; that the same was entered into by the defendant freely and voluntarily, and that at [159] the time of the execution thereof the defendant was not acting under any duress or other disability.”

Then you have another paragraph that says quite simply and appropriately:

“That between September 22, 1942, and March 7, 1947, the defendant made or caused to be made, weekly payments in the sum of \$50 pursuant to the provisions of said agreement which payments were made by the defendant with knowledge of said agreement and its provisions and of the nature of said payments.”

That is clearly borne out by his own testimony, that he knew what the checks were for.

Even the so-called expert on cross-examination testified, as the court will recall, after he was shown a number of checks and was asked, “In your opinion, did the defendant know what he was doing?” And the answer was, “Yes.” And the daughter so testified. So that we have ample proof that at the time of the making of said checks he had knowledge of the payments.

Now, it is not necessary to go outside of the essential ultimate facts to formulate the judgment and

findings. For example, on each allegation in the answer, no matter how evidentiary it might be, it is not essential, for example, to [160] make a finding of fact on whether or not it is true; that this action was brought or prosecuted while the defendant was working 12 or 18 hours a day, or any of the other evidentiary averments in the answer. There is no necessity to encumber the findings all along the line with these incidental and extraneous factual or evidential claims of the defendant.

The important thing in the findings is to embody the ultimate facts, to embody the judgment, so that they are clear and concise, and there is no confusion whatsoever. I think the findings should stand as signed, and the judgment as entered is eminently proper and should be permitted to stand.

The Court: Are you through on the objections to the findings? Both sides?

Mr. Weber: Yes.

Mr. Riseley: Yes.

The Court: After reconsidering the proposed findings of fact and conclusions of law and judgment, the court has reached the conclusion that they refer to certain paragraphs in the complaint which contain allegations of fact involving the determination that the court made in deciding the case very clearly and explicitly, and counsel for the plaintiff this morning has very clearly and logically explained the contents of these proposed findings, and coupled them with the [161] allegations of the complaint which are allegations of fact involved on the questions raised.

The court adopts the views expressed here by counsel for the plaintiff, that that is a specific and fair proposed findings of fact and conclusions of law, and for that reason the objections to the proposed findings of fact and conclusions of law will be denied, and they will be settled as of this date, because I am giving him the opportunity this morning to be heard on it. So your motion will be denied, and instead of being settled on the 20th, they are being settled as of this morning, after hearing counsel for the defendant, and they will be redated March 24th.

The Clerk: And will be refiled as of this date?

The Court: Yes.

Mr. Weber: The same, I take it, as to the judgment?

The Court: Yes, as to the judgment.

Now we will hear your motion for a new trial, which comes up at this time. I entered the matter of the decision of the case on the merits, and I think the findings inform the defendant as to the findings of fact and conclusion of law very clearly. So the clerk can file this as of now.

The Clerk: Has your Honor redated them?

The Court: The 24th. I will put in here "Allowed" on this date, too. You might make a note that the objections on the record are denied. Also, let the record show that [162] the objections made to the proposed findings and decree this morning are denied.

Now we will hear the motion for a new trial.

The Clerk: Shall I write that on here for your signature, your Honor, or do you want a minute order?

The Court: You might write that on here, and you can make a minute order, too, so that there will be no question but what the objections to the proposed findings are denied.

Mr. Riseley: On the motion for the new trial——

The Court: Let me complete this just a minute, after the clerk hands it to me, about allowing the judgment and the proposed findings and decree which I have just ruled on, and which informs the defendant as to the conclusion the court reached on the case at the time it was presented. That will clear the record on that pretty well.

The Clerk: Yes, your Honor.

The Court: You may proceed with your motion for a new trial.

Mr. Riseley: The first ground that we have set out is irregularity in the proceedings of the court and by adverse party by which defendant was prevented from having a fair trial. Under that I might say we made that against two acts of surprise which ordinary prudence could not have guarded against. What happened when we introduced the depositions? I thought, and my client thought, the court would [163] read those depositions and consider them. And you will remember the court asked me did I understand what he said was so? Well, yes, what Weber said the deposi-

tions contained was so. I couldn't say it wasn't.

The Court: Didn't the court ask counsel on both sides as to what the depositions contained, and you argued it?

Mr. Riseley: Yes.

The Court: And I considered them, and considered what both of you stated the depositions contained. So you were not prevented from showing what the depositions contained, because counsel for both sides presented what the depositions were.

Mr. Riseley: Did your Honor read them?

The Court: Well, you explained them here fully before, both sides. I had the depositions here before me, and you explained them to me during the presentation of the evidence.

Mr. Riseley: Mr. Weber explained them, but I said at the time that I had other things to cover, and I thought your Honor would read them.

The Court: Well, I considered the depositions, of course, as explained to me by both of you people as to their contents very fully, and I asked you about them. You were both heard and were given an opportunity, and I considered counsel was explaining it before me. It is the same as though you stipulated to a fact. The depositions were considered. Of course I considered them because you presented them to me, as to what they contained. Go ahead.

Mr. Riseley: Well, I have got across my point. I was under the mistaken impression that the court

was going to read them, and I assert that as a ground in the motion.

The Court: When you tell me what the deposition contains, that is sufficient. There is no question about it. Both of you did, and you argued at length in the main argument before I decided the case. So your depositions were not ignored and the contents as explained by counsel at the time were considered.

Mr. Riseley: That is what messed up the case.

The Court: If it was messed up, you lawyers messed it up.

Mr. Riseley: Yes, your Honor.

The Court: And you didn't mess it up, but you made a clear statement of what the depositions contain, both of you, in your main argument, and I took it you understood what their depositions were, just as if you presented them.

Mr. Weber: I go one step further, your Honor. I think it is unfair of him to say that because the matter was deferred until we both were agreed, and we had to concur upon the contents.

The Court: You agreed before me as to what?

Mr. Weber: I think it is unfair of him to say that. [165]

The Court: I considered the depositions for both of you.

Mr. Weber: And the reception of the depositions was deferred until we agreed.

The Court: I took it for granted that both of you presented the depositions to me fairly and just

like any other instrument that you offer. You had the opportunity, counsel.

Mr. Riseley: I will assign further an irregularity in this instance: The court, when these depositions were being considered and Mr. Weber was talking on them, I showed a hesitancy, I was afraid that that was what was happening, but I couldn't understand then what was happening, and the judge said to me, "What is the matter? Can't you understand anything I say?" And I said, "Yes, sir." And at that time——

The Court: What judge said that to you? What judge made that remark?

Mr. Riseley: The judge that tried the case, your Honor. He said, "What is the matter? Can't you understand anything I say?"

The Court: Here from this bench?

Mr. Riseley: Yes.

Mr. Weber: You mean Judge Cavanah?

Mr. Riseley: Yes. That was when you were introducing these depositions, and all these people were waiting to try [166] this other case, and everybody was in a hurry.

The Court: I asked, "Did you understand me?" And you seemed to. That is certainly not offensive to you, is it? You had full opportunity to present and you did present the depositions, on both sides, and if I did make that statement, I was inquiring whether you understood me.

Mr. Riseley: When I said, "Yes," I was saying I understood you.

The Court: I can't read your mind, and I have to take what counsel says. I can't read any other view that you had in your mind that you didn't explain at the time.

Mr. Riseley: Another ground is: The insufficiency of the evidence to justify the decision. I read somewhere the other day that a lawyer is not limited in his argument just to being logical, but that he can be as illogical as he wants to. That, to me, typifies this case. The defendant was represented by an attorney. Yes, I suppose so. I suppose if that is so you have guaranteed insurance that any time you exact from an insane man an instrument, if there was an attorney in the case, it is good, it is positively good. That would be the same thing as saying if you are able to bring up here and put a psychiatrist on the stand to say a man is incompetent, he is absolutely incompetent. It is no more wrong to say one than the other, and yet we wouldn't want to say either one of them. And that takes us back to [167] these depositions.

I said to the court that there were inconsistencies in the depositions, and the court understood that, as to the conduct of this attorney, who has been established here as a judge, as a justice of the peace, or a city judge, or something. He was practicing at that time. If we had gone into this more fully, and if we had a new trial, we could do so. I put into my interrogatories, I thought, enough to indicate that this man was engaged in some other

kind of business as well as practicing as a lawyer, as well as being a judge; that he was managing a real estate business.

Mr. Weber: Where in the record is there any suggestion of that?

Mr. Riseley: Then we have new evidence, newly discovered evidence.

Mr. Weber: He was asked that question in the interrogatories, and the answer was, "No." I don't think counsel should be permitted to put into this case a lot of alleged matter that has no place in the record at all.

Mr. Riseley: It is fair to comment on the fact——

Mr. Weber: He was asked that question, and the answer was, "No." The implication he is trying to put before the court is that something about his counsel——

Mr. Riseley: The defendant said he talked continually about the Moscow trials to his attorney.

Mr. Weber: May I inquire what the relevancy is as to whether Mr. Zimmerman had some extraneous things he talked about?

The Court: I will hear both of you. Go ahead with your argument in the regular way. I will hear both of you.

Mr. Riseley: I was commenting on the importance of the defendant being represented by an attorney all the way through this case. The defendant knows more about what went into Judge Zimmerman's mind. The questions he asked in the

deposition, and he related things, separate things that could have gone through Judge Charles Zimmerman to Jack Klaw, and went to the other side. I don't know if that is an implied collusion, but it is the truth. It is well founded that they have a lot of information, with the two boys working back east hand in hand. The Simon and Zimmerman depositions conflict because Simon says he told my client, "You are sure to lose this case." Zimmerman denies any such thing. Then they all deny that my client said anything about the Moscow trials, and yet according to my witnesses he talked about the Moscow trials all the time. He said all the time, "Let it be Moscow trial. Let it be Moscow trial." And if they say that is not so, there are three possibilities. They can all be telling the truth. If they are, then my client was suffering from a hallucination, he thought he was talking about the Moscow trials. Otherwise, either my client [169] was lying, or they were lying. Those are the three possibilities.

So the inference that should be drawn about whether or not the defendant was represented by an attorney should not be so difficult, in view of the other testimony, in view of the testimony that he was of unsound mind at the time he executed these instruments.

Now, in this case, if it takes a new trial to do it, it won't take very long, because we have got almost all of the evidence. We can probably discover a little more, but these depositions are good,

and that was the plaintiff's case, and I don't think she has established her case.

Now, like this defendant's discussion with his attorney, I ask, "Did they prove anything?" I don't think that they did. Most of the contents of that discussion were put in the plaintiff's mouth by the learned and well-informed attorney for the plaintiff, as to what the discussions were. And he was well informed. He asked questions that never came out in any of these depositions, never came from anywhere, and the plaintiff said, "Yes." All these intricate details about these tools. If they want to put it in so as to draw an inference, the court should be allowed to look at that and draw the inference.

I submit, your Honor, he was mentally unsound. He wasn't totally without understanding. He wasn't an idiot. [170] I can take you out here to the County Hospital and take you to the Army Hospitals I have seen, and I can show you men, and those men that are of unsound mind, mentally ill, have good memories, and they will talk to you and tell you what happened last week or tell you what happened last year, and appear perfectly rational sometimes.

Dr. Baro characterized this man as being a reactive depressive, a form of psychosis, a manic-depressive psychosis. Those people are noted in the medical books, as a matter of general knowledge, some of them, as being terrifically clever at times. They get such big ideas that lots of people

are taken in by them, and we have all had them in our practice. We have had people come in with these big ideas. Every one of us has a few that we avoid in our practice. I have a lady that comes in and says she has a claim against the Industrial Accident Commission. She is coherent, and can tell you what happened yesterday or the day before yesterday, but she isn't of sound mind.

So in his discussions when he says that he remembered some of this, it doesn't necessarily prove that he was of sound mind, in the face of all this other evidence as to his symptoms, and the expert evidence as to the conclusion that he was of unsound mind. By the same token, what was the effect of these payments? What was the effect of these checks? They were fed to the daughter and sent to the [171] mother. He wrote them. Attorney Klaw says here in the deposition that he had to send a portion of them back because the defendant would either forget to date them or forget to sign them. There are two inferences there. Either he was careless, or he was, as we contend, of unsound mind. He didn't do things right. They drummed it into him that he was supposed to sign those checks, and he did. On the first few checks, Attorney Zimmerman wrote some out for him and handed them to him to sign. He said this was to get rid of the law suit. So if he was of unsound mind at the time, and remained of unsound mind clear through to 1947, the checks don't mean anything. He could still have gone on, and he was

paying them to his wife, but that wouldn't mean anything.

Then I don't think that the right inference has been drawn from the evidence as to this rescission, as to what the effect of this agreement I speak of in my motion on the findings was. I think that constituted a rescission, in effect, to cut off all the legal effect of that obligation, and I think that in the face of the expert testimony, as well as with all the other testimony we put on, there was a preponderance of evidence establishing that we had come up and reached that point of showing that he was of unsound mind, and left then the burden on the plaintiff to show that he had a lucid interval or that the agreement was fair and [172] without duress, without undue influence being exercised. I think that the defense went that far, and that the plaintiff didn't offer any evidence to controvert it. She might be able to do so on a retrial. I don't know. But I think that for that reason there was error in law in not considering the substantive effect of adducing that much evidence, and the procedural effect of it. I cited the case of *Aikens v. Roberts* as authority for that.

The error in law occurring in the trial is the holding by the court obliquely now, since the date of the findings have been changed, that this agreement cannot be held to be and this agreement is not contrary to public policy. I think that the court would have to construe this agreement, and in any way of construction it has been pointed

out and I don't believe it can be construed as within public policy.

Now, we heard a lot of talk about these agreements being signed every day and being held good every day. I venture to say that, with all this stack of paper, I have read practically every case on property settlement agreements that has been decided in the State of New York, and most of the other states, and I haven't seen any case in which this paragraph Ninth has been decided in exactly that form. I cited the case of *American Trust Co. v. Nash*, which had the same feature in it, with the \$165 limitation on that bonus. But this one in its paragraph Ninth gives this woman a flat [173] \$200 a month, a bonus of \$50 a week. It gives her this house, which is a three-apartment house. That is mentioned in some of the depositions, and that has an income of about \$100 a month. Then, in addition, she has the right to go into court, and she can't bring this agreement in there, neither can the husband, and get all the alimony she can get there.

In other words, it would be like saying, "Listen, sue me for divorce, and you can get alimony, and I will give you \$50 a week on top of that, or \$100 a week," or whatever he said. Would that be a valid agreement? Of course it wouldn't.

I think that for that reason error in law in interpreting this agreement has been committed, and that the only way to interpret the agreement is

that it is void, as contrary to good morals and public policy.

The Court: What is your recollection as to the date of this divorce that was granted down in Florida?

Mr. Riseley: No evidence was entered on that, but I have that decree here. Another thing, specifically——

The Court: Let's get through with this date, first.

Mr. Riseley: The 3rd of September, 1947.

The Court: There was a divorce entered finally?

Mr. Riseley: What is that?

The Court: I say, there was a divorce entered?

Mr. Riseley: There was a divorce entered. [174]

The Court: In September, 1947.

Mr. Riseley: While we are at it in this informal manner, let's go one step further. This was an action to set aside the property settlement agreement that is being sued on here, brought down there in 1947 on substantially the same grounds, and we are resisting it here. They had service by publication. They had actual notice to the plaintiff here, the wife. There were protracted negotiations with her attorney down there, and in the end she did not enter any appearance in that suit, because she was afraid to come down and litigate the agreement, as it was, when the evidence was a little fresher, to be sure. So they granted this decree of divorce, but, specifically, the court in Florida does not make any finding as to the valid-

ity of the property settlement or as to the defendant's obligation to support the wife, as she has the right to do, and as I pointed out to the court, and even with this judgment she can still do it. As I pointed out, in the agreement this is merely a bonus. Was that a bonus for him to go down there and get a divorce decree?

The Court: What do you contend was the life of this separation agreement? How long does it last?

Mr. Riseley: It lasts, by its own terms, for the life of the wife, or until she gets married, or until the death of the husband, I believe. It is: [175]

“The death of the wife.

“The remarriage of the wife.

“The granting of a decree of divorce in favor of the husband against the wife by a court of competent jurisdiction in the State of New York provided the granting of such decree is based on the ground that the wife is living in open and notorious adulterous relations.

“The repudiation of this agreement by consent of the parties provided said repudiation is in writing and duly signed and acknowledged by each of the parties thereto.

“The death of the husband, but nothing herein contained shall be deemed to relieve the estate of the husband from any obligation incurred hereunder by the husband prior to his death.”

The Court: What period of time do you con-

tend is involved in the amount sued here in this case before me? What years?

Mr. Riseley: The judgment runs from some time in 1947 up to the present date, I believe. Counsel has said he hadn't paid her anything from 1947.

Mr. Weber: 1948.

Mr. Riseley: That was an oversight. Between 1947 and 1948 he paid her \$50, sometimes \$30, and sometimes \$20, a [176] total of \$970.

The Court: That was after the divorce was entered?

Mr. Riseley: Oh, yes. He recognized she was still his wife. The Florida court specifically pointed out that they were not going to try to adjudicate his duty to support the wife. It said they will operate——

The Court: They will operate under the separation agreement. The court took that view of it in the divorce proceedings, so that left it open.

Mr. Riseley: They had no jurisdiction, you see.

The Court: They left it open, because the court had no jurisdiction to determine the separation agreement. So they left it still in existence. That is what I was trying to get your view on.

Mr. Riseley: That is right.

The Court: They didn't set it aside or didn't litigate it down there.

Mr. Riseley: No, although she had noticed it. It was down there to litigate if she wanted to litigate it. In other words, the courts have been open to her since 1947. I mean she was getting sympathy because she hadn't got any money since 1948.

The Court: But the defendant went down to litigate the divorce.

Mr. Riseley: My client did. [177]

The Court: In 1947?

Mr. Riseley: Yes.

The Court: And he didn't get set aside this separation agreement he had made prior to that time.

Mr. Riseley: That is correct.

The Court: So, isn't that still open?

Mr. Riseley: The separation agreement?

The Court: If it was never litigated or set aside. And that is what we are considering here. It is still here.

Mr. Riseley: If it is a separation agreement. I say it lacks the form of it because of the bonus provision.

The Court: Whatever it was, it is an agreement in writing, and they both made it?

Mr. Riseley: That is right.

The Court: And it has never been disturbed by any court?

Mr. Riseley: That is right.

The Court: That is your situation, then, under those circumstances, that you are attacking the agreement's validity, to see if he was competent. I understand your point.

Mr. Riseley: You mean if the man was competent——

The Court: It would still be in existence.

Mr. Riseley: Then we are back in the public policy field.

The Court: Go ahead. I understand your contentions.

Mr. Riseley: Well, it is our contention that this paragraph Ninth of the agreement is just the kind of agreement that offended in this American Trust Company case, that is, by keeping the court from ever touching this agreement.

You understand, when we were talking about this Florida divorce a moment ago, they didn't just bring it in there. The action was an action in equity to set this agreement aside because it was wrongfully procured and against public policy, but they didn't decide it because they didn't have any jurisdiction over it. But most of your separation agreements are in equity. In the absence of formal proof here, the remedy on a separation agreement traditionally is an action on specific performance in equity, whether they bring it into the divorce court or not. I have looked and looked, and I can't find any cases. It is like a husband suing his wife for assault and battery. You don't do that. You don't find any cases on that, when they are still married, because there are only certain things people can litigate between themselves, and there are only certain cases where they can do it.

There is some question in my mind as to whether or not—and I think I raised it—as to whether or not this complaint states a cause of action. It doesn't allege the marriage. It doesn't allege the divorce. It alleges they are still married and says: I am coming into Federal Court and I am suing.

Can the wife sue her husband for anything [179] except divorce, or separation and support, or for the specific performance of a separation agreement?

That is kind of getting off the beaten track, but, anyway, on this paragraph Ninth my argument is by keeping it away from the courts it is, in effect, a bonus to the wife to do something. Now, on the face of it, it might be a bonus to her to get a divorce. On another view of it, it might be a bonus to her not to appear in the Florida divorce action. I don't have any evidence to offer on that, so that you can't draw that kind of an inference. You can only draw the kind of inference from what the effect of it is, that this is to be in addition to whatever the court might give her at any time. That it is to be in addition to that. So for that reason I say that it just misses doing what this settlement agreement in this *American Trust Company v. Nash* case did do, and that is a New York case. They held that was valid because of that \$165 limitation.

Counsel said he read hundreds of cases on this, and that it was in the form books, and I have never seen it. I have never seen any kind of settlement agreement where, when you finally came in and sued for separation, the court could not take and look at it and say, "I incorporate it in the decree," or "I modify it to say," or "I do this or that to it," because otherwise you have one where the parties try to keep outside the reaches of the court, and it can amount [180] to a bonus.

An agreement, as counsel for the plaintiff pointed out—we all know that property settlement agreements, when they started out, the usual thing was to promise the wife so much if she would get a divorce, and that was held void. So they began to hold more and more of them void, so the parties had to get more skillful so as to accomplish the same result and still not have a void agreement. So they tried everything else. In this American Trust Company case they tried just what was tried here, except they had just enough wisdom to put that \$165 limitation on it, which distinguishes it from the agreement before us. This agreement here provides just for a flat bonus of \$50 a week, and anything the court might give her for alimony, which is an inducement, an illegal inducement to the wife to get the divorce. That is my view.

Now, the husband, as your Honor pointed out, and we all know, went and got the divorce. The wife knew about it, but she didn't litigate it. From that you can draw an inference that this agreement—you see, this agreement has a lot more in it than the \$50 per week. There is testimony in the depositions here—I don't know whether elsewhere or not—there is in Mr. Woynicz's deposition as to this house on Wellman Avenue, that the house has three apartments. I understand—I don't know whether it is in evidence—that [181] as to the income from the apartments, she is occupying the one and renting the other two for about \$100 a month. She has a life estate in that. It was a pretty good

agreement, but the view of it I take is that it is contrary to public policy.

I don't have anything more on the motion, your Honor.

The Court: Before you close, the court now suggests to you and is granting to you the opportunity on this motion for a new trial to read in full, if you wish, or explain again, the contents of these depositions that you have referred to, on the question as to whether they were fully before the court when the case was tried on its merits, before I decided it. While I am satisfied they were fully presented to the court by both counsel, and introduced in evidence, and I considered them, since you have asserted here that you think it is unfair for the court to go on, after I thought the contents had been agreed to by both counsel, I am now granting you this opportunity, if you want, to read these depositions in full before me now, or explain them again, so that there can be no misunderstanding or thought that the court ignored you on these matters. But I want to say I am sure there is nothing there that would change my view on this motion for a new trial. But so there will be no question about the depositions being considered by me on the hearing, you may proceed to read them, [182] if you wish, or you may proceed on the record as it is before me.

Mr. Riseley: I think I will read the depositions, your Honor.

The Court: You can go ahead.

Mr. Riseley: This is No. 9324-PH, deposition of J. Charles Zimmerman:

“The deposition of J. Charles Zimmerman of 66 West Park Avenue, Long Beach, New York, was taken before me, a notary public in and for the County of Nassau, State of New York, on the 18th day of November, 1949, at 66 West Park Avenue, in the County of Nassau, City of Long Beach, pursuant to the annexed notice and a copy of a stipulation annexed thereto, which copy has been compared by me with the duplicate original thereof and is in all respects an exact copy thereof, on behalf of the plaintiff in the above-entitled action pending in the above-named Court.

“Jack Klaw, Esq., of 521 Fifth Avenue, New York City, State of New York, appeared as attorney for the plaintiff, and after waiting until 2:35 p.m., no one appeared as attorney for the defendant. Written interrogatories under Rule 30(c) FRCP to be propounded to the aforesaid witness by the [183] officer taking the deposition under the aforesaid notice, was delivered to me, a copy of which is hereto annexed.

DEPOSITION OF
J. CHARLES ZIMMERMAN

being by me first duly sworn to tell the whole truth
as hereinafter certified, testified as follows:

“Direct Examination

“By Mr. Klaw:

“Q. What is your full name?

“A. J. Charles Zimmerman.

“Q. And your residence?

“A. I live at 175 West Beech Street, Long Beach, New York.

“Q. You are an attorney admitted to practice in the Courts of the State of New York?

“A. Yes.

“Q. How long have you been so admitted?

“A. Upwards of 30 years.

“Q. And you now maintain your law office at 66 West Park Avenue, Long Beach, New York?

“A. Yes.

“Q. And in August, 1942, were you a member of the Judiciary of the State of New York?

“A. Yes.

“Q. And at that time, as I recall, you were a Judge [184] of the City Court of the City of Long Beach? A. Yes.

“Q. How long had you been such member of such Court? A. Since January 1st, 1926.

“Q. Continuously thereafter until when, Judge?

“A. Until December 31st, 1945.

“Q. And that was an elective position?

(Deposition of J. Charles Zimmerman.)

“A. Yes, for all except the first four years.

“Q. And in 1942 were you a member of the law firm of Zimmerman & Simon? A. Yes.

“Q. And do you recall in August, 1942, that you were retained by Mr. Leonard Woynicz Sianozecki, also known as Leonard Woynicz, in connection with a separation action brought against him by his wife, Alexandra Woynicz Sianozecki, also known as Alexandra Woynicz, in the Supreme Court of the State of New York, County of Bronx?

“A. Yes.

“Q. At the time when he retained you, did Mr. Woynicz deliver to you a copy of the Summons and Complaint and the plaintiff's Notice of Motion, with the affidavits annexed thereto, for temporary alimony and counsel fees that were previously served upon him in said action? A. Yes.

“Q. Do you still have a copy of the said Summons and Complaint and Notice of Motion and affidavits?

“A. No, but I have a penciled memorandum on the file which reads, ‘Delivered original S & C P T and Motion papers to Mr. Woynicz.’

“Q. Do you—I show you a paper that purports to be the original Summons and Complaint and Notice of Motion and affidavits for temporary alimony and counsel fees, and ask you whether or not you recall receiving a copy of such papers?

“A. I cannot at this time recall whether or not this is the correct copy or not. It seems to be.

(Deposition of J. Charles Zimmerman.)

“Q. Do you recall the amount of temporary alimony sought by the plaintiff in her said motion?

“A. I am not sure, but my recollection is that it was \$100 weekly.

“Q. Do you recall the amount of counsel fees sought by the said motion?

“A. That I cannot recall. [186]

“Q. Do you recall plaintiff's allegations in said motion with respect to defendant's financial net worth?

“A. My recollection is that it was a huge amount based upon the ‘war baby’ business in which the defendant was at that time engaged.

“Q. Do you recall whether the amount of the net worth of the defendant alleged by the plaintiff was in excess of \$100,000.00?

“A. I am pretty sure it was.

“Q. Do you recall the allegation in the affidavit and the complaint in the aforementioned action with respect to the defendant's annual income?

“A. I do not.

“Q. Would you recall whether the charge was made there that the defendant's annual income was in excess of \$15,000 per annum?

“A. I think it was.

“Q. Do you recall whether the complaint in the said action was verified on August 4th, 1942?

“A. I cannot recall.

“Q. When were you retained by Mr. Woynicz?

“A. I believe it was in the month of August, 1942. [187]

(Deposition of J. Charles Zimmerman.)

“Q. I show you a notice of appearance in said action, signed by Zimmerman & Simon, and ask you whether, after referring to said notice of appearance, you can tell us about when you were retained?

“A. This notice is dated August 14, 1942, and it was, therefore, to the best of my recollection, in August prior to that date.

“Q. Do you recall who recommended Mr. Woynicz to you? A. Mr. Louis Rosenberg.

“Q. And what did Mr. Woynicz say to you at the time he retained you? Anything with respect to a matrimonial litigation or matrimonial troubles in which you had theretofore represented Mr. Rosenberg?

“A. I do not recall any reference by Mr. Woynicz to Mr. Rosenberg’s matrimonial differences.

“Q. Did Mr. Woynicz, at the time he retained you, submit to you a letter written to him by Jack Klaw, dated July 21st, 1942?

“A. I do not recall.

“Q. Do you recall whether he told you at the time that he retained you whether, after receipt of a letter by him from Jack Klaw, he telephoned Jack [188] Klaw and offered to enter into a separation agreement under which he was to pay the plaintiff \$20 per week for her maintenance and support?

“A. I do not recall the details, except that I know that he told me that he was negotiating with

(Deposition of J. Charles Zimmerman.)

his wife's lawyer, Mr. Klaw, at the time that he first came to the office.

“Q. Do you recall whether he also told you, at the time he first retained you, that after he had been served with a copy of the Summons and Complaint and the Notice of Motion in the previously mentioned separation action, that he had consulted with an attorney, Charles Ray Smith, of 280 Broadway, New York City, with respect to said Summons and Complaint and Motion?

“A. I recall that he told me that he consulted with another attorney. I now remember, when you mention the name, that it was a man named Smith, and Mr. Woynicz said that Mr. Smith did not engage in matrimonial litigation, and therefore he wanted me to step into the case.

“Q. Do you recall whether Mr. Woynicz told you that Charles Ray Smith was the attorney for the New York Thread Grinding Corporation at the time, of which Mr. Woynicz was a stockholder and officer? [189] A. I do not recall that.

“Q. Do you recall whether Mr. Woynicz informed you at the time that he authorized Mr. Smith to telephone Jack Klaw and advise him that Mr. Woynicz was willing to enter into a separation agreement wherein he would agree to pay to the plaintiff \$30 per week for her support and maintenance?

“A. I remember that Mr. Woynicz told me that

(Deposition of J. Charles Zimmerman.)

Mr. Smith had been communicating with his wife's lawyer, Mr. Klaw. The details I do not recall.

“Q. On the same date that he retained you, did you read the affidavit and Notice of Motion as well as the Summons and Complaint that had theretofore been served upon him?

“A. I read them, but I cannot say whether it was the same day.

“Q. After you read them, did you discuss with the defendant his annual net worth and annual income? A. I did.

“Q. And what, if anything, did the defendant state with respect to such matters?

“A. I think I told you, Mr. Klaw, that I do not want to disclose any confidential discussions, [190] unless Mr. Woynicz consents thereto. I have no interest in the outcome of the present litigation, but I do want to maintain the ethical standards that would be required of me, and if you have Mr. Woynicz's consent to my disclosure of his financial standing, then I would gladly do so, otherwise I must ask you to excuse me.

“Q. After you read the Notice of Motion and Summons and Complaint in the separation action, did you discuss with the defendant his financial net worth and his annual income?

“A. I did.

“Q. Did you discuss with Mr. Woynicz the charges of non-support made by the plaintiff in the said action? A. I did.

(Deposition of J. Charles Zimmerman.)

“Q. And, as a result of your discussions with Mr. Woynicz, do you recall having a conference with Jack Klaw at his office on August 17, 1942, pertaining to a proposed settlement of the separation action and a separation agreement to be entered into between Mr. Woynicz and his wife?

“A. I do not recall the time, but I do recall having conferences with Mr. Klaw at his office.

“Q. Do you recall that in that conversation Jack Klaw told you that the least the plaintiff would accept in settlement was a separation agreement wherein Mr. Woynicz would agree to pay his wife, the plaintiff, the sum of \$75 per week for her maintenance and support, and a conveyance to her of the premises at 2929 Wellman Avenue, Bronx, New York, and the lots adjoining said property.

“A. I recall that Mr. Klaw wanted more than was finally agreed upon. The exact figure I cannot recall, and I do not have any memorandum of it to show the figure. I also recall that Mr. Klaw wanted the property referred to in the question.

“Q. Did you thereafter relate to Mr. Woynicz the substance of those discussions you had with Mr. Klaw on August 17, 1942? A. I did.

“Q. Do you recall whether he understood your statements relating to the substance of that conversation at that time? A. He did.

“Q. Do you recall whether or not at that time, after you had related to Mr. Woynicz the discus-

(Deposition of J. Charles Zimmerman.)

sions you had with Mr. Klaw on August 17th, 1942, he authorized you to make a counter-proposition on his [192] behalf, the substance of which was that he would be willing to pay to his wife the sum of \$50 per week for her maintenance and support, and in lieu thereof, convey to her the fee of the aforementioned premises at 2929 Wellman Avenue, Bronx; was willing to give her a life interest in said property with remainder to the children? A. Yes.

“Q. At the time he authorized you to make this counter-proposition, did you explain to Mr. Woynicz the obligations he was undertaking if that proposition was accepted by his wife?

“A. Yes.

“Q. And did Mr. Woynicz fully understand that obligation? A. He did.

“Q. Did you thereafter have further discussions with Mr. Klaw on August 19th, 1942, August 20th, 1942, and August 21st, 1942, with respect to a proposed settlement of the action and a separation agreement?

“A. The exact dates I cannot recall, and I have no memorandum of them, but I did have continued conferences by phone with Mr. Klaw.

“Q. On August 28th, 1942, did you receive [193] from Jack Klaw the copy of a proposed separation agreement which was prepared by him, to be entered into between Mr. Woynicz and his wife?

“A. I received a letter from Mr. Klaw, dated

(Deposition of J. Charles Zimmerman.)

August 28th, 1942, and with which I received a proposed separation agreement.

“Q. After you received this proposed agreement from Mr. Klaw, did you have any conferences with Mr. Woynicz with respect thereto?

“A. I did.

“Q. Did Mr. Woynicz read that proposed agreement in your presence? A. He did.

“Q. And did Mr. Woynicz evidence understanding of the terms of that proposed agreement?

“A. He understood it.

“Q. Do you still have a copy of that proposed agreement? A. I have.

“Q. Does that proposed separation agreement contain any provision for the return of any tools to Mr. Woynicz?

“A. I do not see anything in the agreement to that effect, except that on my copy of the agreement there is a penciled memorandum in my own handwriting [194] with the following words: ‘Books, wearing apparel, tools in garage.’ These were additions that Mr. Woynicz suggested after he had read the agreement.

“Q. Can you tell us whether that proposed agreement makes any provision for the termination of the weekly payments to Mrs. Woynicz on the death of Mr. Woynicz?

“A. I do not see any in here, but I do see a memorandum in my own handwriting which reads as follows: ‘While both parties hereto shall re-

(Deposition of J. Charles Zimmerman.)

main alive, and so long as the second party shall keep, etc.' This was a memorandum made by me pursuant to Mr. Woynicz's request for a change in that proposed agreement.

"Q. Did you thereafter have further conferences with Mr. Klaw on September 1st, September 2nd and September 9th, 1942, with respect to the changes desired by Mr. Woynicz in the proposed separation agreement that Mr. Klaw had submitted to you previously?

"A. Yes, except that I cannot recall the dates exactly.

"Q. Did Mr. Klaw thereafter, on September 17th, 1942, deliver to you another proposed [195] separation agreement?

"A. I have a letter from Mr. Klaw, dated September 17th, 1942, with which another proposed separation agreement was enclosed.

"Q. I show you a photostatic copy of an agreement between Leonard Woynicz Sianozecki, the defendant, and his wife, Alexandra Woynicz Sianozecki dated September 22nd, 1942, signed by the respective parties thereto, and ask you whether this photostatic copy is an exact copy of the proposed separation agreement which you received from Jack Klaw on September 17th, 1942, with the following exceptions, namely: That on Page marked '1' thereof the date on the first line thereof was blank, and that on Page marked '4' thereof the matter now which appears to have been stricken out was

(Deposition of J. Charles Zimmerman.)

not so stricken out and the initials 'L.W.S.' and 'A.W.S.' did not appear on said Page '4,' and that on Page marked '7' thereof the interlineations, corrections and initials did not appear thereon, and on page marked '8' thereof the date now appearing thereon was left blank and there were no signatures, and on Page marked '9' thereof the places for the dates in the acknowledgments were blank and the signatures of Jack Klaw and Joseph L. [196] Simon on the stamped matter appearing respectively under their respective signatures were not there?

"A. Whether or not this photostat copy is an exact copy of your proposed agreement that was sent to me with your letter of September 17th, 1942, except for the changes you mentioned, I cannot say, because I do not recall whether, between the 22nd of September, 1942, and the 17th of September, 1942, there were any other drafts or proposed agreements between us; but I can tell you that this agreement which you now show me, dated September 22nd, 1942, was the agreement which was read by Mr. Woynicz prior to its execution, and discussed between him and me paragraph by paragraph before it was signed by him.

"Mr. Klaw: I offer in evidence the photostat copy of the agreement between plaintiff and defendant, dated September 22, 1942, and ask that it be marked in evidence as Plaintiff's Exhibit I for Identification.

"Notary: So mark it.

(Deposition of J. Charles Zimmerman.)

(The document was then marked as Plaintiff's Exhibit I for Identification, and initialed.)

"Q. I show you Plaintiff's Exhibit I for Identification, and ask you whether the defendant signed it in your presence.

"A. Yes, he did.

"Q. Before the defendant signed Plaintiff's Exhibit I for Identification, did he have any discussions with you with respect to a clause which appeared on Page '4' thereof, but which was stricken out before it was signed by the parties thereto?

"A. Yes, that was one of the things that he objected to.

"Q. At the time that you saw the defendant sign Plaintiff's Exhibit I for Identification, was Mrs. Woynicz's signature on it?

"A. I do not think so. I think I went to Mr. Klaw's office and Mrs. Woynicz signed it there in my presence.

"Q. Did you also prepare a Deed in accordance with the provisions contained in Paragraph 11 of Plaintiff's Exhibit I for Identification, which Deed was signed by the defendant in your presence?

"A. I did prepare the Deed and, to the best of my recollection, the agreement was signed at the same time.

"Q. Did the defendant read the Deed so prepared by you before he signed it? [198]

(Deposition of J. Charles Zimmerman.)

“A. Yes.

“Q. Did the defendant ever tell you that he wanted the Deed and the separation agreement to provide that the Wife was only to have a life interest in only one of the apartments in the premises described in Plaintiff’s Exhibit I for Identification, and that one of his sons, who was in the Army at the time, should have the right to occupy another apartment on the premises upon his discharge from the Army?

“A. No. To the contrary, Mrs. Woynicz was to have the entire house and get all the income and pay all the taxes until her death and then it was to go to the children.

“Q. Do you recollect whether you, at any time, said anything which might lead Mr. Woynicz to reasonably believe that the separation agreement which is marked as Plaintiff’s Exhibit I for Identification, and the Deed executed by Mr. Woynicz in accordance with the provisions thereof, contained any provision that his wife was to receive a life interest only in one of the apartments in the premises described in said agreement and Deed, and that his son who was in the Army would have a right to occupy the other apartment in said premises [199] upon his return from the Army?

“A. I did not.

“Q. Do you recollect whether you ever told Mr. Woynicz, either in the following words or words to

(Deposition of J. Charles Zimmerman.)

that effect, "Don't go to Court, because you will get the same treatment like Moscow trials"?

"A. I did not.

"Q. Did you ever say anything to Mr. Woynicz which might reasonably lead him to believe that he could not have as witnesses people who were in his employ or people who were employees of the corporation with which Mr. Woynicz was connected because no jury would accept testimony from such people despite they were willing to testify to the truth? A. I did not.

"Q. Did you ever say anything to Mr. Woynicz that would reasonably lead him to believe that, in the event that he desired to defend the separation action, that the only witness you would accept was his daughter, provided his daughter would write for you something in her own handwriting and sign the same? A. I did not.

"Q. Did Mr. Woynicz ever tell you that if the trial had to be like a Moscow trial, then 'let [200] it be a Moscow trial'?

"A. I do not recollect ever hearing the words 'Moscow' or 'Moscow trial' used by either one of us.

"Q. After discussing with Mr. Woynicz the allegations contained in the Summons and Complaint and the Motion papers for alimony and counsel fees in the separation action, do you recollect whether Mr. Woynicz asked you to try to work out an agreement with his wife's attorney? A. He did.

(Deposition of J. Charles Zimmerman.)

“Q. Between the time the defendant retained you and the date of the signing by him of Plaintiff’s Exhibit I for Identification, how many conferences did you have with the defendant?

“A. A mininum of a dozen.

“Q. Was Joseph L. Simon present at some of these conferences that you had with Mr. Woynicz?

“A. I do not recall. Some were had at my office and some were had at his place of business.

“Q. Do you know whether the defendant was able to read English? A. He was.

“Q. Did the defendant ever write any letters to you in the English language? [201]

“A. He did. One on December 4th and one on December 10th, 1942.

“Q. Will you please let me have these letters so that I can mark them in evidence as exhibits?

“A. I do not wish to give up any part of my files. These letters refer to the fee arrangement between Mr. Woynicz and myself. If you want them read into the record, I will read them.

“Q. Did you ever say anything to Mr. Woynicz to the effect that if he defended the separation action and lost it, that everything would be taken from him? A. I did not.

“Q. Did the defendant tell you that he wanted to oppose the motion for temporary alimony?

“A. If he could not make a better settlement, he wanted it opposed.

(Deposition of J. Charles Zimmerman.)

“Q. Did he tell you that he did not want to make any settlement of any nature? A. He did not.

“Q. Did he tell you that he wanted to contest the action brought by his wife and not to enter into any negotiations for a settlement?

“A. No, he did not. He wanted a settlement if it it could be made at better terms than those which his wife asked for in her suit.

“Q. Did you keep the defendant informed of the negotiations you were having with Mr. Klaw with respect to a settlement of the separation action and proposed separation agreements?

“A. I did.

“Q. Did Mr. Woynicz tell you that he did not want a separation, but wanted you to effect a reconciliation of the parties? A. No.

“Q. Did you insist on Mr. Woynicz’ signing the separation agreement? A. I did not.

“Did you ever tell him, either in substance or in words, that if he went to court he would be sunk?

“A. I did not.

“Q. Did you ever tell Mr. Woynicz that you wanted him to sign the agreement as soon as possible, and that he would be a better man if he lived separate and apart from his wife and signed Plaintiff’s Exhibit I for Identification?

“A. I did not.

“Q. Did you ever tell Mr. Woynicz or say [203] anything to him which would reasonably lead him to believe that, regardless of any defense that he

(Deposition of J. Charles Zimmerman.)

might interpose in the separation action, that he would lose the action? A. I did not.

“Q. Did you ever tell him that ‘you have no legs to stand on in the Court’? A. No.

“Q. Did Mr. Woynicz make any request from you to limit the period of the payments that he would be required to make to his wife under the separation agreement marked in evidence as Plaintiff’s Exhibit I for Identification, other than those contained in the agreement?

“A. He asked me if they could be limited, and I replied that if he entered into a separation agreement, it would be for as long as their lives or for the period shortened by the terms of the agreement.

The Court: We will recess now until 2:00 o’clock.

(Whereupon, at 11:55 o’clock a.m., a recess was taken until 2:00 o’clock p.m. of the same day.) [204]

The Court: Proceed.

Mr. Riseley: Continuing with the deposition of J. Charles Zimmerman:

(Continuing reading)

“Did you always converse with Mr. Woynicz in the English language? A. Always.

“Q. Were you able to understand him?

“A. Yes.

“Q. Was Mr. Woynicz able to understand everything that you said to him? A. Yes.

(Deposition of J. Charles Zimmerman.)

“Q. Did you ever say anything to Mr. Woynicz that could reasonably lead him to believe that the Plaintiff’s Exhibit I for Identification that he was signing merely some papers to obtain the dismissal of the action which had been brought against him by his wife?

“A. No, I did not. Mr. Woynicz understood distinctly that this was a separation agreement which was to last for the full period of their lives, as provided for in the agreement.

“Q. Do you recollect whether at any time when you discussed the matter of the separation agreement [205] with Mr. Woynicz, whether Mr. Woynicz was afflicted with a muscular trembling which caused disturbances in his speech?

“A. I recall nothing of the kind.

“Q. Was Mr. Woynicz subject to any unusual lapses of memory?

“A. Not that I could observe at all.

“Q. Were Mr. Woynicz’ actions and speech in your presence rational or irrational?

“A. Rational.

“Q. After Plaintiff’s Exhibit I for Identification was signed by the defendant, did you have occasion to see the defendant or correspond with the defendant, or did the defendant correspond with you?

“A. I know that I communicated with Mr. Woynicz with reference to some details that were unfinished, such as his wife’s ring and some rent question, but I do not recall whether I saw Mr. Woynicz or

(Deposition of J. Charles Zimmerman.)

whether I talked with him by telephone only. I did have correspondence with him, and he wrote me the letters that I spoke of before.

“Q. Did Mr. Woynicz ever complain to you that the terms contained in Plaintiff’s Exhibit I for Identification and the Deed executed in accordance with the terms of that agreement did not reflect his understanding of the terms of said agreement?

“A. No.

“Q. At the time that Mr. Woynicz executed Plaintiff’s Exhibit I for Identification, did he deliver to you a check in the amount of \$350. made payable to the order of Jack Klaw as Attorney for the Plaintiff, to be delivered to Jack Klaw as counsel for the Plaintiff, as provided for in said Plaintiff’s Exhibit I for Identification? A. Yes.

“Q. And did Mr. Woynicz at the same time give you a check made payable to the order of the plaintiff in the sum of \$150. to cover the period under the said separation agreement commencing on August 23rd, 1942, and ending on September 26th, 1942?

“A. I think so. I do not have any distinct recollection of any such check, nor do I have any record of such in my files.

“Q. Did you say anything to Mr. Woynicz before he executed the Plaintiff’s Exhibit I for Identification which could reasonably lead him to believe that, if there was a change in his [207] financial condition after he had executed said Plaintiff’s

(Deposition of J. Charles Zimmerman.)

Exhibit I for Identification or a change in his earnings or earning capacity, that he would not have to make the weekly payments as required by said Plaintiff's Exhibit I for Identification?

"A. No; on the contrary, I pointed out to him that under the laws of this state that a separation agreement would be binding on both him and Mrs. Woynicz, so that neither one of them could change the agreement, whereas a decree of the Court fixing support and maintenance was subject to an application for an increase by his wife, as well as by a decrease by him, but that the Courts honored private separation agreements made between the parties for the life of the agreement.

"Q. Did Mr. Woynicz ever tell you that he had forgotten why he had come to see you?

"A. No.

"Q. Did Mr. Woynicz concentrate on the matters you discussed with him at all times?

"A. I never observed any lack of concentration on his part.

"Q. Did Mr. Woynicz ever tell you that he was under the care of a physician for mental disorders or for a disease of the mind? A. No.

"Interrogatories propounded to the witness by the Notary Public on behalf of the defendant, and his answers thereto:

"Interrogatory No. 1: During the time you represented the defendant in 1942, were you during all of that period engaged in the active practice of law

(Deposition of J. Charles Zimmerman.)

to the exclusion of other pursuits? A. Yes.

“Interrogatory No. 2: During the time you represented the defendant in 1942, were you, during any portion of that period, a judge, justice, or other official functionary of any court, including courts not of record? A. Yes.

“Interrogatory No. 3: If so, what was your office, duties, time expended per week in those duties, and over what period of time did you serve?

“A. I was Judge of the City Court, entailing as much time as was necessary from day to day.

“Interrogatory No. 4: During the period you represented the defendant, or during any portion of it, were you engaged in a real estate business? [209]

“A. No.

“Interrogatory No. 5: If so, over what period of time were you so engaged and how much time per week did you devote to that pursuit?

“A. No answer.

“Interrogatory No. 6: During the period you represented the defendant, or during any portion of that period, were you engaged in any way in the activity of real estate management, either for yourself or for others? A. No.

“Interrogatory No. 7: If so, describe the nature and extent of your duties, the nature and number of the units managed or supervised, and how much time per week was devoted to those pursuits?

“A. No answer.

(Deposition of J. Charles Zimmerman.)

“Interrogatory No. 8: Do you recall whether or not Mr. Leonard Woynicz ever complained to you of severe headaches when he was in your office during 1942? A. He did not.

“Interrogatory No. 9: Do you recall whether or not when Mr. Woynicz was in your office as a client, the conferences were interrupted by telephone [210] calls from painters, plumbers, and coal delivermen at any times, and if so, about how many of such interruptions were there?

“A. No more than any other lawyer would be interrupted by business calls.

“Interrogatory No. 10: Have you ever been a partner of, or associated in any way with one Louis Rosenberg?

“A. About 15 years ago, I had one business dealing with Mr. Rosenberg.

“Interrogatory No. 11: If so, what was the nature of your relationship with Rosenberg, in what sort of activity were you engaged, and over what period of time, and how much time per week did you spend in such activity?

“A. He was a garage broker and we had a garage deal together. That was over long before I met Mr. Woynicz.

“Interrogatory No. 12: On one occasion, in your office, in 1942, during the pendency of the separate maintenance action, did you say to Mr. Woynicz,

(Deposition of J. Charles Zimmerman.)

'Robbers. Robbers. Painters, robbers. Plumbers, robbers. Coal deliverymen, robbers'?

"A. No. [211]

"Interrogatory No. 13: do your recall that Mr. Woynicz in your office in the summer of 1942 told you that he was so desperate that he didn't know what to do? A. No.

"Interrogatory No. 14: Did Mr. Woynicz ever discuss, during the summer of 1942, the possibilities of suicide with you? A. No.

"Interrogatory No. 15: Do you recall that there were times, during the period that you represented Mr. Woynicz, that he could not understand what you were saying to him? A. No.

"Interrogatory No. 16: Did not Mr. Woynicz have great difficulty in understanding what you were trying to explain to him at times? A. No.

"Interrogatory No. 17: Do you recall any occasion when Mr. Woynicz was unable to make you understand what he was saying? A. No.

"Interrogatory No. 18: If so, please relate them, and tell whether it appeared to you that the difficulty was caused by nervousness, describing [212] Mr. Woynicz's outward manifestations as you saw them at the time. A. No answer.

"Interrogatory No. 19: So far as you could observe and hear, was Mr. Woynicz suffering from

(Deposition of J. Charles Zimmerman.)

difficulties of speech during the time you represented him? A. No.

“Interrogatory No. 20: If any of your conversations with Mr. Woynicz, did he ever say anything to you about the Moscow Trials? A. No.

Interrogatory No. 21: If so, please relate the substance of all the conversations so far as the Moscow Trials were involved. A. No answer.

“Interrogatory No. 22: Did Mr. Woynicz ever exhibit to you any unusual outward manifestations such as trembling, fear, anger, tears, depression, distorted facial expressions, or otherwise, and if so, describe them, and tell when and where.

“A. No.

“Interrogatory No. 23: Do you recall whether Mr. Woynicz ever complained to you of his health, during the time you represented him, and if so, [213] what complaints did he make and when were they made, and how many did he make?

“A. I have a faint recollection of his saying that he had an abdominal operation sometime prior to the time he came to my office.

“Interrogatory No. 24: Do you recall whether Mr. Woynicz ever talked excessively to you about the Moscow trials? A. He did not.

“Interrogatory No. 25: During the time you represented Mr. Woynicz, do you recall whether his

(Deposition of J. Charles Zimmerman.)

hands would at times shake when he talked or listened to you? A. They did not.

“Interrogatory No. 26: Did you ever at any time say anything to Mr. Woynicz from which he reasonably could have understood that he would be allowed only one witness on his behalf, his daughter Wanda, and then only if she would put everything in her own handwriting and sign it? A. No.

“Interrogatory No. 27: Did you ever at any time say anything to Mr. Woynicz from which he reasonably could have understood that none of his friends, partners, or employees would be allowed [214] to testify on his behalf at the trial of the then pending separation action? A. No.

“Interrogatory No. 28: Did you ever at any time say anything to Mr. Woynicz from which he could have reasonably understood that trials in the State of New York were not fairly conducted?

“A. No.

“Interrogatory No. 29: Did you ever at any time say anything to Mr. Woynicz from which he could have reasonably understood that trials in the State of New York were conducted like the Moscow trials?

“A. No.

“Interrogatory No. 30: Did you ever at any time say anything to Mr. Woynicz from which he could have reasonably understood that a jury sitting in a trial court in the State of New York would not

(Deposition of J. Charles Zimmerman.)

believe an honest witness who was telling the truth?

“A. No

“Interrogatory No. 31: Did you ever at any time say anything to Mr. Woynicz from which he could have reasonably understood that you were promising to pay him \$400 or any amount whatever?

“A. No. [215]

“Interrogatory No. 32: Did you ever at any time say anything to Mr. Woynicz from which he might reasonably have understood that the girl, Mary, who was named in the separation action, and/or her parents would not be allowed to testify as to the innocent nature of Mary’s friendship with him?

“A. No.

“Interrogatory No. 33: Did you ever at any time say anything to Mr. Woynicz from which he might have reasonably understood that testimony to the effect that Mary was the girl friend of his son Robert would not be allowed in court? A. No.

“Interrogatory No. 34: Has there ever been any disagreement between you and Mr. Woynicz over fees? If so, what?

“A. He refused to pay me the balance of \$100, claiming that the amount he paid me was the amount agreed upon. I did nothing after he refused to pay this sum.

“Interrogatory No. 35: Did you ever observe that Mr. Woynicz had trouble remembering things?

“A. No.

(Deposition of J. Charles Zimmerman.)

“Interrogatory No. 36: Did you ever have to refresh the memory of Mr. Woynicz? [216]

“A. No.

“Interrogatory No. 37: Did you ever characterize the work in which Mr. Woynicz was engaged as ‘trying work’ which would make it possible for events to escape his memory? A. No.

“/s/ J. CHARLES ZIMMERMAN.

“Witness:

“MILTON POPPER,
“Notary Public.”

The notary public’s certification follows. I don’t have the date on my copy.

This is the deposition of Joseph L. Simon in this action:

“The depositions of Joseph L. Simon of 60 East 42nd Street, New York City, State of New York, and Jack Klaw of 521 Fifth Avenue, New York City, State of New York, were taken before me, a notary public in and for the County of New York, State of New York, on the 17th day of November, 1949, at Room 1801, 521 Fifth Avenue, in the County of New York, pursuant to the annexed notice and the annexed stipulation, on behalf of the plaintiff in the above-entitled action pending in the above-named Court.

“Jack Klaw, Esq., of 521 Fifth Avenue, [217]

New York City, State of New York, appeared as attorney for the plaintiff, and after waiting until 11 A.M., no one appeared as attorney for the defendant. Written interrogatories under Rule 30(c) FRCP to be propounded to the aforesaid witnesses by the officer taking the deposition under the aforesaid notices, were delivered to me, copies of which are hereto annexed.

DEPOSITION OF
"JOSEPH L. SIMON

"being by me first duly sworn to tell the whole truth as hereinafter certified, testified as follows:

"Direct Examination

"By Mr. Klaw:

"Q. What is your full name?

"A. Joseph Lewis Simon.

"Q. And your residence?

"A. I live at 200 Haven Avenue, New York 33, N. Y.

"Q. You are an attorney admitted to practice in the Courts of the State of New York?

"A. I am.

"Q. How long have you been so admitted?

"A. I was admitted in May, 1938.

"Q. Where do you maintain your law office?

"A. At 60 East 42nd Street, New York City, New York.

"Q. Do you know the defendant in this action, Leonard Woynicz, also known as Leonard Woynicz Sianozecki?

(Deposition of Joseph L. Simon.)

“A. I have met him on several occasions.

“Q. During the year 1942, were you associated with J. Charles Zimmerman in the practice of law under the firm name of Zimmerman & Simon at 17 East 42nd Street, in the Borough of Manhattan?

“A. I was.

“Q. Was it in connection with your association with Mr. Zimmerman that you met the defendant?

“A. It was.

“Q. Do you recall about when you met the defendant herein for the first time?

“A. Some time in the summer of 1942.

“Q. Were you present during the conversation between the defendant and Mr. Zimmerman when the defendant retained your firm to represent him in connection with an action which had then been instituted by the defendant's wife in the Supreme Court, Bronx County, which action sought a separation together with alimony and counsel fees.

“A. I was present when the defendant came to the office but I do not believe that I was present during the conversation which took place between him and Mr. Zimmerman on that occasion

“Q. Were you present at any conversations between the defendant and Mr. Zimmerman?

“A. I was present on several occasions in which the defendant and Mr. Zimmerman discussed the action brought by the defendant's wife against him in the Supreme Court, Bronx County, for separation.

“Q. I show you an agreement dated September

(Deposition of Joseph L. Simon.)

22, 1942, between Alexandra Woynicz Sianozecki, and Leonard Woynicz Sianozecki, and ask you whether the signature of Joseph L. Simon appearing on page 9 thereof as notary, is your signature.

“A. It is.

“Q. I show you this photostat copy of the executed agreement which I have just referred to and ask you whether it is in all details an exact copy thereof. A. Yes.

“Mr. Klaw: I will ask that the photostat copy of the agreement between plaintiff and defendant dated September 22, 1942, be marked as [220] Plaintiff's Exhibit 1 for Identification.

“(The notary then marked the document as Plaintiff's Exhibit 1 for Identification and initialed it.)

“Q. Did you sign your name to this agreement, marked Plaintiff's Exhibit 1 for Identification, as notary public acknowledging the signature of Leonard Woynicz Sianozecki to that agreement?

“A. I did.

“Q. And did Mr. Sianozecki sign this agreement in your presence? A. He did.

“Q. Did Mr. Sianozecki sign his name to this agreement and did you sign your name as notary public to this agreement on September 22, 1942?

“A. Yes.

“Q. At the time this agreement was so signed by the defendant, did his wife's signature appear in the agreement?

(Deposition of Joseph L. Simon.)

“A. In answer to your question, may I say that I have refreshed my recollection by reference to correspondence in the files of Zimmerman & Simon which confirms my recollection that Mrs. Woynicz Sianozecki’s signature was not placed upon the instrument until a later date.

“Q. Were the conversations that you had with the defendant, referred to by you heretofore, had before the signing of Plaintiff’s Exhibit 1 for Identification? A. Yes.

“Q. Can you tell us with respect to what matters in particular these conversations were had?

“A. I participated in the drafting of Exhibit 1 herein for identification and took part in several conversations concerning the terms thereof with Mr. Zimmerman and the defendant and I particularly remember being present at discussions which dealt with the amount of alimony to be paid under the agreement and the disposal of the real property referred to in the agreement.

“Q. Do you recall how many conferences you had with the defendant and conferences the defendant had with Mr. Zimmerman at which you were present, prior to the signing of the agreement marked Plaintiff’s Exhibit 1 for Identification, by the defendant?

“A. To the best of my recollection, I never had a conversation with the defendant at which Mr. Zimmerman was not present and I believe that I took part in two, three or possibly four conversa-

(Deposition of Joseph L. Simon.)

tions on different dates, at which the three of us were [222] present.

“Q. Do you recall whether prior to the defendant’s execution of Plaintiff’s Exhibit 1 for Identification herein, any proposed separation agreements were prepared by you or submitted to you by Jack Klaw who was then Mrs. Woynicz’s attorney?

“A. In answer to this question, I have refreshed my recollection from the files and I may say that a proposed agreement was submitted to the firm by Mr. Klaw, and we, in turn, prepared a separation agreement which was submitted to Mr. Klaw.

“Q. Did these prior conversations that the defendant had with Mr. Zimmerman in your presence relate to the proposed terms in the separation agreements? A. In part.

“Q. Do you recall whether there was a discussion between the defendant and Mr. Zimmerman relating to the custody, control and education of the son, Robert?

“A. I recall that the defendant was very much concerned about his children’s welfare and I recall being present on at least one conversation in which provision concerning these matters was discussed between Mr. Zimmerman and the defendant.

“Q. Do you recall whether the defendant insisted that the separation agreement contain a provision that he shall have the sole custody, control and education of Robert and that he would assume responsibility and liability for Robert’s adequate

(Deposition of Joseph L. Simon.)

support, maintenance and education consistent with his financial means, environment and mode of living?

“A. He was very insistent on these provisions.

“Q. Do you recall whether there were any conversations between the defendant and Mr. Zimmerman relating to the amount of weekly support the defendant would agree to pay to his wife under the separation agreement?

“A. Yes, I do. There were such conversations and the final amount which he agreed to pay was one which was reached after a considerable amount of discussion between Mr. Zimmerman and the defendant and a considerable amount of bargaining back and forth with Mr. Klaw. At some of these discussions, I was present.

“Q. During any of these conversations in which you were present, did the defendant and Mr. Zimmerman discuss the question of conveying to the defendant's [224] wife a life interest in premises 2929 Wellman Avenue, Bronx?

“A. I am not sure about the address but I was present at such conversations insofar as they were related to conveying the property described in this agreement and if that is the address of the property described in the agreement, then the answer to the question is yes.

“Q. Did the defendant speak in the English language to you or to Mr. Zimmerman on the occasions he spoke to you or on the occasions he spoke to Mr. Zimmerman in your presence?

(Deposition of Joseph L. Simon.)

“A. All conversations took place in English.

“Q. Did the defendant read the agreement marked Plaintiff’s Exhibit 1 for Identification herein before signing it?

“A. I don’t recall whether he read it. I know that Mr. Zimmerman explained and read each paragraph to him in my presence. This was Mr. Zimmerman’s usual practice with all of his clients.

“Q. During these conversations, do you recall whether the answers by the defendant to questions propounded to him by Mr. Zimmerman were responsive at all times?

“A. The defendant’s English was not wholly fluent and any questions to which he did not give a responsive answer, he communicated his lack of understanding and the question was rephrased so that he would understand it.

“Q. Did the acts and conversations of the defendant in your presence impress you at the time as being rational or irrational?

“A. Rational.

“Q. Did Mr. Zimmerman explain to the defendant in detail in your presence, each of the terms contained in Plaintiff’s Exhibit 1 for Identification, before the defendant signed it?

“A. That is my recollection.

“Q. Do you recall whether the defendant understood the terms of Plaintiff’s Exhibit 1 for Identification after Mr. Zimmerman explained them to him?

(Deposition of Joseph L. Simon.)

“A. His participation and responses and questions concerning the agreement demonstrated to me that he understood.

“Q. Did you ever hear the defendant tell Mr. Zimmerman that he preferred to litigate the action commenced by his wife for separation and whether Mr. Zimmerman said to him ‘Don’t go to Court because you will get the same treatment like [226] Moscow trials’ or words to that effect?

A. No, definitely not.

“Q. Did you ever hear Mr. Zimmerman tell the defendant that he could not bring his witnesses to any trial that might be had in the separation action then pending between the defendant and his wife, if the witnesses were receiving salaries or being paid by the defendant or the defendant’s firm?

“A. No.

“Q. Did you ever hear Mr. Zimmerman tell the defendant that no jury would take the testimony from such witnesses brought by the defendant to any trial? A. No.

“Q. Did you ever hear Mr. Zimmerman tell the defendant that if he went to trial in the action that everything would be taken from him?

“A. No.

“Q. Did you ever hear the defendant tell Mr. Zimmerman that he wanted him to effect a reconciliation between the parties? A. No.

“Q. Did you ever hear Mr. Zimmerman tell the defendant that if he went to Court to litigate [227]

(Deposition of Joseph L. Simon.)

the separation action that was brought against him that he would be sunk?

“A. My recollection is that Mr. Zimmerman advised the defendant that he would probably not succeed in his defense of the separation action.

“Q. During the conversations between Mr. Zimmerman and the defendant in your presence, or in his conversations with you, did the defendant appear frightened? A. Definitely not.

“Q. Was the defendant attentive in the conversations between him and Mr. Zimmerman and the conversations with you? A. Intensely so.

“Q. Did the defendant ever tell you or Mr. Zimmerman in your presence of any physical or mental illness or discuss his health?

“A. None whatever.

“Q. Do you recall his physical appearance during the times that you saw him? A. Yes.

“Q. Do you recall whether he was afflicted with any muscular trembling?

“A. I recall that he was not.

“Q. Do you recall whether his hands shook?

“A. They did not.

“Q. Was he subject to any unusual lapses of memory in your presence?

“A. Not about matters which were discussed in my presence.

“Q. Do you recall whether the defendant clearly understood at the time of his execution of Plaintiff's Exhibit I for Identification that he was not

(Deposition of Joseph L. Simon.)

merely signing a paper which would result in a discontinuance of the separation action brought against him by his wife, but that he was undertaking a lifelong obligation to pay his wife \$50.00 per week and conveying to her a life interest in the real property referred to in Plaintiff's Exhibit 1 for Identification?

"A. He gave every evidence of such understanding.

"Q. Do you recall whether the defendant ever stated that the tools referred to in Plaintiff's Exhibit 1 for Identification belonged to his son Robert?

"A. No.

"Q. Do you recall whether the defendant read the deed conveying a life interest in premises 2929 Wellman Avenue to the plaintiff in accordance with [229] the provisions of Plaintiff's Exhibit 1 for Identification before signing same?

"A. Yes, he read it.

"Q. Did you also read the deed to him?

"A. I did not. I believe Mr. Zimmerman did.

"Q. Did the defendant ever tell you or Mr. Zimmerman in your presence who referred him to your firm?

"A. Yes, he was referred to our firm by one of Mr. Zimmerman's clients who was associated with Mr. Woynicz in business and Mr. Zimmerman had just finished handling a matrimonial matter for such client which was concluded by the execution of a separation agreement between the parties thereto.

(Deposition of Joseph L. Simon.)

Mr. Woynicz wanted his matter handled in a similar fashion.

“Q. Do you know whether at the time the defendant executed Plaintiff’s Exhibit 1 for Identification he freely executed the same and consented to be bound by the terms thereof?

“A. He understood the terms and he voluntarily signed the agreement and knew what his obligations were under it.

“Q. Did Mr. Woynicz ever exhibit in your presence any unusual outward manifestations such as trembling, [230] fear, anger, tears, depression or distorted facial expressions? A. No.

“Q. Did you ever hear Mr. Zimmerman tell Mr. Woynicz anything from which he could reasonably understand that trials in the State of New York were conducted like Moscow trials?

“A. No.

“Q. Did you ever at any time hear Mr. Zimmerman say anything to Mr. Woynicz from which he could have reasonably understood that a trial Court or a jury sitting in a trial Court in the State of New York, would not believe any of his witnesses who was telling the truth? A. No.

“Q. Did you ever hear Mr. Zimmerman say anything to Mr. Woynicz from which he could reasonably have understood that the only witness that the defendant would be able to produce on the trial of the separation action was his daughter and that the

(Deposition of Joseph L. Simon.)

defendant should get the daughter to write in her own handwriting and sign a paper? A. No.

“Q. Did you ever hear Mr. Zimmerman say anything to Mr. Woynicz from which he could reasonably [231] have understood that under the terms of Plaintiff’s Exhibit 1 for Identification, and the deed conveying a life interest to defendant’s wife to the real property referred to in such agreement, that defendant’s wife was to have the right to one apartment only as long as she lived and that upon the return of his son from the Army service, the son would have the right to move into the premises conveyed by said deed? A. No.

“Interrogatories propounded to the witness on behalf of the defendant, and his answers thereto:

“Interrogatory No. 1: State what your relationship to J. Charles Zimmerman was in 1942, and what your relationship is to him now?

“A. In 1942, J. Charles Zimmerman and I were partners in the practice of law. We conducted our partnership under the name of Zimmerman & Simon at 17 East 42nd Street, New York 17, New York. At the present time, Mr. Zimmerman and I are not associated in any way whatsoever.

“Interrogatory No. 2: Have you discussed the testimony [232] which you are to give in this deposition with any persons and if so name the persons?

(Deposition of Joseph L. Simon.)

“A. I have discussed my testimony with no persons.

“Interrogatory No. 3: If you have ever seen the defendant in this action, please give a physical description of him as he was at the last time you saw him, and state when and where that was.

“A. My recollection is that the defendant at the time I last saw him, which I believe was on the date he signed the separation agreement marked herein as Plaintiff’s Exhibit 1 for Identification, or very shortly thereafter, at the office of Zimmerman & Simon, was a tall man, over six feet in height, fairly wide shouldered, giving the impression of substantial physical strength, rather square faced, clean shaven and having light brown hair.

“Interrogatory No. 4: If you are the Joseph L. Simon who notarized a separation agreement between plaintiff and defendant on September 22, 1942, I ask you whether or not at the time of the execution of that document, you heard the defendant Leonard Woynicz say anything about ‘Moscow Trials’?

“A. I am that Joseph L. Simon and I did not hear [233] any such statement.

“Interrogatory No. 5: Did you ever hear the defendant ever at any time mention Moscow Trial, or Moscow Trials, and if so, when, where and what did he say?

“A. I never heard any reference to Moscow Trial, or Moscow Trials from the defendant.

(Deposition of Joseph L. Simon.)

“Interrogatory No. 6: Did you ever hear the defendant complain about his state of health or headaches, and if so, when, where, and what did he say?

“A. I never heard the defendant complain about the state of his health or headaches.

“Interrogatory No. 7: Are you at present, or have you been in the past, a party to any agreements or arrangements of any kind whatever with Jack Klaw, and if so, when and what?

“A. I have never been a party to any arrangements or agreements with Jack Klaw. I have never handled any matter in the course of my practice other than the separation action involving the defendant and his wife, in which Mr. Klaw was in any way involved. I have never seen Mr. Klaw until today.

“Interrogatory No. 8: At the time the [234] defendant executed the agreement of September 22, 1942, how long were you in his presence or where you could observe him?

“A. I was in his presence where I could observe him during the entire time of his visit on that day to the office of Zimmerman & Simon. I do not recall the duration of that visit.

“Interrogatory No. 9: Do you have any interest in fees that might be due J. Charles Zimmerman?

“A. None whatsoever.

“Interrogatory No. 10: So far as you know, from your relationship to J. Charles Zimmerman,

(Deposition of Joseph L. Simon.)

if any, are any fees due Zimmerman from Defendant?

“A. I believe that none are due; I am not absolutely sure.

“Interrogatory No. 11: If you have testified to having overheard, or been present at any conversations whatever between Mr. Woynicz and Mr. Zimmerman, would you state, to the best of your recollection, the date of each such conversation, and between what times of day, and how long you were present, and whether, as to each conversation, you heard the entire conversation that took place, and whether you were actually in Mr. Woynicz’ presence during [235] the entire time of each conversation to which you have testified.

“A. These conversations occurred more than seven years ago. They involved a matter in which Mr. Zimmerman was principally concerned rather than myself and over which he had complete charge. Entries concerning the dates of these conversations and all of visits of the defendant to our office were made in Mr. Zimmerman’s personal diary and I made no entries concerning them in my own. I do not have access at the moment to Mr. Zimmerman’s diary covering the period in question since he is engaged in the practice of law in another county. To the best of my recollection, however, these conversations took place at the offices of Zimmerman & Simon in the months of August and September of 1942. I was present at two, three or four of such

(Deposition of Joseph L. Simon.)

conversations and possibly more and I have no recollection whatsoever of the time of day or the exact dates upon which these conversations took place and could not refresh my recollection except by reference to the diary aforementioned. Furthermore, I am unable to say at this time whether in the conversations at which I was present, I was present at the whole or only at part of these conversations.

“Interrogatory No. 12: Did you ever at any time say anything to Mr. Woynicz, or hear anyone say anything to Mr. Woynicz from which he could reasonably have understood that trials in the State of New York were conducted like Moscow Trials?

“A. Certainly not.

“Interrogatory No. 13: Did you ever at any time say anything to Mr. Woynicz, or hear anyone say anything to Mr. Woynicz from which he could reasonably have understood that trials in the State of New York were not fairly conducted?

“A. Certainly not.

“Interrogatory No. 14: At the time of the execution of the agreement of September 22, 1942, was the agreement read to Mr. Woynicz? A. Yes.

“Interrogatory No. 15: Have you ever represented Mrs. Woynicz, or served her in any way whatever? A. Certainly not.

“Interrogatory No. 16: Would you describe Mr. Woynicz' manner of speech at times when you have heard him talk?

(Deposition of Joseph L. Simon.)

“A. I am not sure that I understand the question but if it asks what I think it does, Mr. [237] Woynicz speaks with a very strong Slavic accent in a deep tone and in fairly staccato fashion.

“Interrogatory No. 17: Did you ever have difficulty in understanding him?

“A. My ears happen to be attuned to the East European accent so that I never had any difficulty understanding him.

“Interrogatory No. 18: Did he ever repeat things he had just said, or speak in broken sentences? If so, describe.

“A. Speaking in broken sentences is a common habit of people who do not have a good command of the English language and I daresay that he did on occasion speak in broken sentences. I do not recall whether he ever repeated himself but it may well be that he did.

“Interrogatory No. 19: When in your presence, was Mr. Woynicz able to sit still and concentrate on what was going on, or was he restless, and apt to lose the trend of conversation, or apt to return to a subject which has been closed?

“A. I noticed no such traits on Mr. Woynicz's part.

“/s/ JOSEPH LEWIS SIMON.

“Witness:

“IRVING KLEIN,
“Notary Public.”

“DEPOSITION OF
“JACK KLAU

being by me first duly sworn to tell the whole truth as hereinafter certified, testified as follows:

“Direct Examination

“By Mr. Klaw:

“Q. What is your full name?

“A. Jack Klaw.

“Q. And your residence?

“A. 2055 Anthony Avenue, Bronx, New York City.

“Q. Are you an attorney admitted to practice in the Courts of the State of New York?

“A. I am.

“Q. How long have you been so admitted and practicing?

“A. Since 1929.

“Q. Where do you maintain your law office?

“A. At 521 Fifth Avenue, New York City, New York.

“Q. Do you know the plaintiff in this action, Alexandra Woynicz, also known as Alexandra Woynicz Sianozecki? A. I do.

“Q. In 1942 did the plaintiff consult you with reference to her husband, Leonard Woynicz? [239]

“A. Yes. She told me that her husband had failed to furnish her with support and retained me to communicate with her husband.

“Q. Did you thereafter communicate with her husband?

(Deposition of Jack Klaw.)

“A. I did. On July 21st, 1942, I wrote him a letter.

“Q. Have you a copy of this letter?

“A. Yes.

“Mr. Klaw: I offer in evidence copy of a letter dated July 21, 1942, addressed to Mr. Leonard Woynicz and ask that it be marked in evidence as Plaintiff's Exhibit II for Identification.

“(The notary then marked the document as Plaintiff's Exhibit II for Identification and initialed it.)

“Q. Thereafter, did you receive a telephone call from Mr. Woynicz?

“A. Yes. My docket shows, and I recall, that two days later, on July 23rd, 1942, a person who said he was Leonard Woynicz telephoned me. He told me that he received my letter of July 21, 1942, and that he would like to come to an agreement relative to the support of his wife. He told me that he was willing to pay her \$20.00 a week for her support. [240] I told him that his offer was unacceptable and he concluded by saying that he would not pay any more.

“Q. In what language did you and Mr. Woynicz converse?

“A. In the English language.

“Q. Were you able to understand him?

“A. Very clearly.

“Q. Did he understand you and comprehend what you said to him?

(Deposition of Jack Klaw.)

“A. He gave every indication that he understood me fully.

“Q. Thereafter, did you represent Mrs. Woynicz in an action commenced by her for separation against her husband in the Supreme Court of the State of New York, County of Bronx?

“A. Yes. On August 4th, 1942, I prepared a summons and complaint in an action for separation which was verified by Mrs. Woynicz on said date and also affidavits and notice of motion for temporary alimony of \$100.00 per week and counsel fees of \$1000.00.

“Q. Do you know whether these papers were served on the defendant?

“A. Yes. These papers were served on the [241] defendant by my process server on August 6th, 1942, at his then place of business at 237 Lafayette Street, in the Borough of Manhattan, City of New York.

“Q. Have you a copy of these papers that were served on Mr. Woynicz? A. Yes.

“Mr. Klaw: I offer in evidence copy of summons and complaint and affidavits and notice of motion in action entitled ‘Alexandra Woynicz Sianozecki, Plaintiff, against Leonard Woynicz Sianozecki, also known as Leonard Woynicz, Defendant, and ask that they be marked in evidence as Plaintiff’s Exhibit III for Identification.

“(The notary ten marked the document as Plaintiff’s Exhibit III for Identification and initialed it.)

(Deposition of Jack Klaw.)

“Q. What happened thereafter?

“A. The following day, on August 7th, 1942, I received a telephone call from an attorney whom I know, Charles Ray Small, who has his offices at 280 Broadway, New York City. He told me that Mr. Woynicz had brought to him the copy of the papers that had been served on him in the separation action and wanted to know whether there was a [242] possibility of settling the matter through the entry of a separation agreement between the parties. I then asked him what the defendant had in mind. He told me that the defendant, Mr. Woynicz, authorized him to state that he was willing to enter into a separation agreement providing for the payment by the defendant to Mrs. Woynicz of \$30.00 a week. I told Mr. Small that this sum was unacceptable.

“Q. Did you thereafter hear from Mr. Small?

“A. No.

“Q. What happened thereafter?

“A. On August 13th, 1942, I received a telephone call from an attorney, J. Charles Zimmerman, who told me that the defendant had retained him to represent him in a separation action which had been commenced by Mrs. Woynicz and requested an adjournment of the motion. Two days later, on August 15th, 1942, I received a notice of appearance in said action from the law firm of Zimmerman & Simon whose post office address was 17 East 42nd Street, New York City.

“Q. Thereafter did you have any discussions

(Deposition of Jack Klaw.)

with Mr. Zimmerman relative to the separation action?

“A. Yes. On August 17th, 1942, Mr. Zimmerman [243] conferred with me at my office relating to a proposed settlement of the separation action. I told him that the plaintiff wanted the defendant to enter into a separation agreement with her wherein he would agree to pay her \$100.00 a week during her life for her maintenance and support and also that defendant convey to plaintiff in fee simple the two family house owned by him known as number 2929 Wellman Avenue, Bronx, and the lots adjoining the same. The home of the parties was maintained in one of the apartments in said building. Mr. Zimmerman then told me that he would take the matter up with Mr. Woynicz and after that he would give me the latter's answer.

“Q. What happened thereafter?

“A. I had further conferences with Mr. Zimmerman on August 19th, 20th and 21st of 1942. During these conferences, Mr. Zimmerman told me that the defendant insisted that he would only pay \$50.00 a week and that defendant wanted the separation agreement to contain a provision giving him the custody of Robert, one of the children of the parties, and also that he would not convey the real property to which I referred heretofore to plaintiff in fee simple but would only convey the [244] property to her for life with the remainder over to their three children.

(Deposition of Jack Klaw.)

“Q. What happened thereafter?

“A. On August 28th, 1942, after getting the plaintiff's consent to these terms, I prepared a separation agreement along the lines discussed with Mr. Zimmerman and delivered the same to him for execution by the defendant.

“Q. What happened thereafter?

“A. On September 1st, 2nd and 9th of 1942, I had further conferences with Mr. Zimmerman wherein he told me that the defendant wanted the agreement to provide that he be given six weeks' time to remove his personal tools, books and wearing apparel from the property heretofore referred to by me and that the agreement was to terminate on the defendant's death.

“Q. What happened thereafter?

“A. After plaintiff consented to defendant's demands, I prepared a new agreement and delivered the same to Mr. Zimmerman for defendant's execution on September 17th, 1942.

“Q. What happened after that?

“A. On September 22nd, 1942, Mr. Zimmerman phoned me and told me that the defendant had [245] executed the agreement on which the present suit is based, and the deed referred to in the agreement. An appointment was made with Mr. Zimmerman to present the agreement on September 23rd, 1942, at my office to be signed by plaintiff. On September 23rd, 1942, the plaintiff signed that agreement at my office in the presence of Mr. Zimmerman at

(Deposition of Jack Klaw.)

which time Mr. Zimmerman also presented the deed referred to in this agreement, executed by the defendant, together with defendant's check to the plaintiff for \$150.00 being the payments due under the agreement from August 23rd, 1942, to September 22nd, 1942, as well as defendant's check to my order for \$350.00 as my fees in accordance with paragraph 'Seventh' of the separation agreement.

"Q. Did you thereafter at any time communicate with the defendant with reference to the separation agreement?

"A. Yes. On April 16th, 1943, plaintiff brought in to me checks which the defendant had sent her which he had failed to sign. On that date, I wrote to the defendant a letter in which I referred to the separation agreement.

"Q. Do you have a copy of this letter? [246]

"A. Yes.

"Mr. Klaw: I offer in evidence copy of a letter dated April 16, 1943, addressed to Mr. Leonard Woynicz and ask that it be marked in evidence as Plaintiff's Exhibit IV for Identification.

"(The notary then marked the document as Plaintiff's Exhibit IV for Identification and initialed it.)

"Q. What is the full extent of your relationship to Irving Klein?

"A. None, except that I have known him for some time.

(Deposition of Jack Klaw.)

“Interrogatories propounded to the witness on behalf of the defendant, and his answers thereto:

“Interrogatory No. 1: Have you ever at any time seen the defendant?

“A. No.

“Interrogatory No. 2: If so, when, where, and who was present? A. No answer.

“Q. Interrogatory No. 3: Isn't it true that shortly [247] after the summons was served in the separation action in 1942 that you received a telephone call from Leonard Woynicz, or someone who stated that he was Leonard Woynicz?

“A. No. On July 23rd, 1942, I received a telephone call from Leonard Woynicz or someone who stated that he was Leonard Woynicz after I mailed him the letter marked Plaintiff's Exhibit II for Identification.

“Interrogatory No. 4: If so, please relate to the best of your recollection the entire conversation.

“A. He told me that he received my letter of July 21st, 1942, and that he would like to come to an agreement relative to the support of his wife. He told me that he was willing to pay her \$20.00 a week for her support. I told him that his offer was unacceptable and he concluded by saying that he would not pay any more.

“Interrogatory No. 5: Isn't it true that in the course of the above telephone conversation, the caller asked you if the suit were a joke?

(Deposition of Jack Klaw.)

“A. It is not true. He never mentioned the word ‘joke’ nor did he make any statement from which one could infer that he considered the matter [248] in the light of a joke.

“Interrogatory No. 6: Isn’t it true that the caller, who purported to be Leonard Woynicz, lacked reasonableness and coherence in his conversation?

“A. No. The caller was quite coherent in his conversation. I do not understand what is meant by the phrase ‘lacked reasonableness.’ If it refers to the offer of \$20.00 a week for the support and maintenance of the plaintiff, then the offer certainly lacked reasonableness in relation to the defendant’s then earning capacity and wealth.

“Interrogatory No. 7: Isn’t it true that you are financially interested in the action for which this deposition is being taken?

“A. The only extent of my financial interest in this action is that a forwarding fee is to be paid to me by the attorney of record, the amount of which is dependent upon the outcome of this action.

“Interrogatory No. 8: Isn’t it true that you have this present action on a fifty per cent contingent basis and that you are to share the proceeds with the California attorneys for the plaintiff? [249]

“A. I do not have this action on a fifty per cent contingent basis. I will receive a forwarding fee as already explained.

(Deposition of Jack Klaw.)

“Interrogatory No. 9: Have you ever at any time advanced any money whatever toward the financing of the costs and expenses of this action?

“A. No. All of the costs and expenses to date have been paid by the plaintiff.

“Interrogatory No. 10: If so, when, to whom, for what, and how much? A. No answer.

“Interrogatory No. 11: Did you have a conversation with Robert Woynicz at your office about December, 1946, or any time at all? “A. Yes.

“Interrogatory No. 12: Isn't it true that during the course of a conversation with Robert Woynicz, about December, 1946, that you said that Leonard Woynicz had a large sum of money hidden somewhere in the world? A. No.

“Interrogatory No. 13: Do you still represent Alexandra Woynicz as her attorney in any matters whatever? A. Yes. [250]

“Interrogatory No. 14: If the attorney-client relationship between yourself and Mrs. Woynicz no longer exists, when did it cease to exist?

“A. No answer.

“Interrogatory No. 15: Do you stand to gain financially if this suit is successful directly, or indirectly?

“A. Yes, only to the extent of receiving a forwarding fee to which I have already testified.

(Deposition of Jack Klaw.)

“Interrogatory No. 16: Do you owe the plaintiff in this action any money? A. No.

“Interrogatory No. 17: Does the plaintiff in this action owe you any money? A. No.

“Interrogatory No. 18: Are you at present obligated to the plaintiff in any way whatever?

“A. No.

“Interrogatory No. 19: Is the plaintiff at present obligated to you in any way whatever?

“A. No.

“Interrogatory No. 20: Are you at present a party with the plaintiff to any agreements whatever, oral or written? [251]

“No, except the retainer agreement in this action.

“Interrogatory No. 21: Are you at present a party with Daniel A. Weber, the attorney of record for the plaintiff, to any agreements whatever, oral or written?

“A. Yes, to the extent of receiving a forwarding fee in this action to which I have previously testified.

“Interrogatory No. 22: Just what is your relationship with Daniel A. Weber?

“A. None other than the usual relationship that exists between a forwarding attorney and the attorney to whom the former refers a legal matter.

(Deposition of Jack Klaw.)

“Interrogatory No. 23: What is the full extent of your relationship with Milton Kail?”

“A. Mr. Kail is an office associate who on previous occasions has retained me to do some work for him.

“/s/ JACK KLAU.

“Witness:

“IRVING KLEIN,
“Notary Public.”

Then follows the notary's certificate of Irving Klein, Notary Public, and the marking in evidence of Plaintiff's Exhibit II, for Identification, on deposition of Jack Klaw, a letter, dated November 17, 1949:

“July 21st, 1942.

“Mr. Leonard Woynicz,
“c/o New York Thread Grinding Corp.,
“237 Lafayette Street,
“New York City.

“Dear Sir:

“Your wife, Alexandra Woynicz, has consulted me with reference to your failure to furnish support to her.

“Before instituting action against you in accordance with her instructions, I desire to afford you

(Deposition of Jack Klaw.)

the opportunity of amicably adjusting this matter.

“Unless I hear from you on or before Friday, July 24th, 1942, as to your intentions in this matter, I shall have no other alternative but to institute action against you in accordance with your wife’s instructions.

“Very truly yours,

“JACK KLAW.”

Then, marked in evidence as Plaintiff’s Exhibit IV, for [253] identification, on deposition of Jack Klaw, November 17, 1949, a letter dated :

“April 16, 1943.

“Mr. Leonard Woynicz,

“New York Thread Grinding Corp.,

“237 Lafayette Street,

“New York, N. Y.

“Dear Sir:—

“I am herewith returning to you your checks Nos. 425, 426, 427 and 428, each in the sum of \$50.00, payable to the order of your wife, Mrs. A. Woynicz.

“The first check is returned to you because your Bank refused to receive the same for collection due to the fact that you superimposed the date of the making of the check, April 5, on some other date which you had first placed.

(Deposition of Jack Klaw.)

“The other checks are returned to you because you have failed to sign the same.

“I cannot understand why you repeatedly cause unsigned checks to be sent to my client and sometimes feel that it is a steadied attempt to cause her to undergo a great deal of annoyance and trouble.

“I trust that my feelings are wrong in this [254] matter and that in the future you will be more prompt in sending the checks due to Mrs. Woynicz under the agreement, in such form that your Bank will accept the same for payment.

“Your very truly,

“JACK KLAU.”

Now, with the court's permission, I would like to read one or two excerpts from the defendant's deposition.

The Court: You can read any deposition you wish. At least, I want you to do that. I want you to read them all.

Mr. Riseley: This is the deposition of Leonard Woynicz Sianozecki, taken on behalf of the Plaintiff, Tuesday, June 28, 1949, before David Newman, Notary Public.

I start on page 11:

DEPOSITION OF
LEONARD WOYNICZ SIANOZECKI

[First eleven pages of this deposition appear on pages 319 to 326 of this printed record.]

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Do you recall in August of 1942, certain papers were served on you in the action that Mrs.— A. Yes.

“Q. Do you recall the month? Was it August 1942?

“A. I don’t recall the month what it was. I know it was summertime.

“Q. Do you recall what papers she served on you? A. Yes.

“Q. What were they? [255]

“A. Was false, was a lie.

“Q. No, do you recall what kind of papers they were? Was it an action for a separation?

“A. Yes, that is right.

“Q. When you got the papers, did you communicate with anybody?

“A. I’ll tell you something, I was accused falsely of everything.

“Q. Just a moment. You will get a chance to bring all this out.

“A. I will tell you. I was innocent. I even thought it was a joke.

“Q. Mr. Woynicz, when you got your papers, did you telephone Mr. Klaw?

“A. After two weeks later I called him and asked him if it was a joke. Listen, I can accuse your mother—

“Q. Mr. Woynicz, these fellows are very expensive, the Reporters, and they get something like \$.60 a page.

(Deposition of Leonard Woynicz Sianozecki.)

“A. O. K.

“Q. You telephoned Mr. Klaw, is that right?

“A. Yes, and asked him if that is a joke or not.

I thought it was a joke.

“Q. What did Mr. Klaw say to you? [256]

“A. He said, ‘No, Mr. Woynicz, it isn’t a joke. It is all true.’

“Q. Did you then consult a lawyer?

“A. Then really I wanted to consult Mr. Small.

“Q. Charles Ray Small?

“A. My company lawyer, but——

“Q. Was he the lawyer for your company?

“A. Yes, but he don’t handle such a thing. He wanted to introduce me to somebody else.

“Q. Did Mr. Small tell you what the papers contained? A. No, he did not.

“Q. He recommended somebody else?

“A. He recommended, but I didn’t take it. My partner, he recommended me Mr. Zimmerman.

“Q. Did you go to Mr. Zimmerman?

“A. Yes, I went to Mr. Zimmerman.

“Q. And was that in New York City?

“A. Yes.

“Q. Was Mr. Zimmerman a judge at that time?

“A. I don’t know what he was.

“Q. Did you bring the papers to Mr. Zimmerman? A. Yes, I did.

“Q. Did Mr. Small go with you? [257]

“A. No.

“Q. You went there alone? A. Alone.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Did you have a talk with Mr. Zimmerman?

“A. I showed to him, I said——

“Q. Did you give him the papers?

“A. Yes, I did.

“Q. Did you have a conversation with him at the time you were in his office?

“A. Well, what conversation was there? He will take the case or not and he said ‘yes.’

“Q. Did he say anything to you about the nature of the papers?

“A. I don’t recall what he told me, but only on thing, I wanted to go to Court and he absolutely say ‘Don’t go to Court because you will get the same treatment like Moscow give.’ That is the truth.

“Q. Mr. Zimmerman told you that?

“A. Yes.

“Q. Now, during this conversation, was anybody else present aside from you and Mr. Zimmerman?

“A. No, nobody was there.

“Q. Now, before Mr. Zimmerman mentioned anything about Moscow, did you say anything to him about Moscow?” [258]

Then there are some marks on this answer.

“A. Yes, I said—he said—I said ‘Here are all my witnesses, every witness what I said. I used to come to shop six o’clock in the morning and left eight o’clock.’

“Q. Mr. Woynicz, you understand that your answers must be limited to the questions, otherwise we’ll never get finished.

(Deposition of Leonard Woynicz Sianozecki.)

“A. O. K. That is what I come to that. He said ‘You pay them. You cannot bring them.’ My partner, he would refuse because he is a partner. So I said ‘Here so what you are laughing, the Moscow Trial, the same thing here, I cannot bring anybody here.’ He said, ‘Yes, you have the same thing here. No jury will take testimony from those people.’ That was the question. He only wanted to accept testimony from my daughter. He refused every one of my witnesses. He refused everyone except my daughter and he said if my daughter write in own handwriting and sign that paper that he will accept it, and I told him ‘Let it be Moscow Trial. I don’t want my daughter. How my wife was bad or good, but she was mother to my daughter’ and I told him ‘I will not take testimony of child to protect myself’ and I say ‘Here, give me, I will [259] sign anything you want. If there be Moscow Trial, let it be Moscow Trial’.”

Then there is a lot more to it of the same effect, but that is all I wanted to get in, your Honor.

The Court: Do I understand that you have read to me all of the depositions that I have taken?

Mr. Riseley: No. I have read all of the depositions of Mr. Simon, and Mr. Klaw, and Mr. Zimmerman, and a portion of the deposition taken on behalf of the plaintiff of the defendant, who testified here.

The Court: Why not read the rest of it?

Mr. Riseley: Well, I can.

(Deposition of Leonard Woynicz Sianozecki.)

The Court: You think that the court ought to hear all the depositions. That is your assertion on your motion. So just complete the whole depositions that were taken by both parties.

Mr. Riseley: All right. I lost my place.

Mr. Weber: The top of page 15.

Mr. Riseley: I started on page 11. I am now at the top of page 15:

“Q. Mr. Woynicz, when you told that to Mr. Zimmerman, did he tell you that he would refuse to represent you? A. He did not.

“Q. He told you he was going to continue [260] in the case, is that right?

“A. There was no continue to the case. I signed the paper and that is, all, to fulfill——

“Q. Did you tell Mr. Zimmerman to see whether he could work out any arrangement or agreement with Mr. Klaw?

“A. That was around everything——

“Q. Mr. Woynicz, see if my question is clear.

“A. There was no use in talking.

“Q. Did you say to Mr. Zimmerman ‘Try to work out an agreement with Mrs. Woynicz’s lawyer’?

“A. Maybe I told him, I don’t recall. I don’t think so.

“Q. Do you recall whether or not in your conversation with Mr. Klaw, you know the telephone call to Mr. Klaw——

“A. It was very short conversation.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. —do you recall whether or not you discussed any sum of money with Mr. Klaw?

“A. I don’t recall. I wouldn’t know. I was half crazy at that time. I don’t know nothing. I know that I thought that was a joke. Really, I mean it.

“Q. Did you offer Mr. Klaw, or did you offer to Mr. Klaw to pay Mrs. Woynicz \$20.00 a week?

“A. I don’t recall. I don’t think so.

“Q. Did you offer to pay any sum of money to Mr. Klaw?

“A. To Mr. Klaw I don’t know for nothing.

“Q. Your answer is that you don’t recall whether or not in your conversation with Mr. Klaw you discussed with him the payment?

“A. I don’t think there was, because it was very short you see. I was really half lunatic at that time. Now, that, if somebody is accusing you of things what you are not——

“Q. Mr. Woynicz——

“A. I don’t know what I was talking, that is all I know.

“Q. You don’t remember that subject?

“A. No, I don’t think I offered anything because I had nothing to say to him.

“Q. How many visits did you make to Mr. Zimmerman’s office? How many times did you visit Mr. Zimmerman?

“A. This I don’t recall. That is absolutely out of my brain.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Do you know a Mr. Simon, Mr. Zimmerman’s partner?

“A. Yes, that was some young fellow there [262] in another room.

“Q. Do you recall whether or not at any of your conversations with Mr. Zimmerman, Mr. Simon was there?

“A. I don’t know. I know—I don’t know what his name was, but there was a young fellow in his office, in another office something like here.

“Q. Do you recall whether or not there was anybody present when you spoke to Mr. Zimmerman, was anybody else in the room when you spoke to him?

“A. Some time. He was not all the time.

“Q. In other words, there was some occasions when somebody else was present during your conversation with Mr. Zimmerman? A. Yes.

“Q. Was that Mr. Simon?

“A. I don’t know what his name is. Probably his name is—associated, whatever you call it.

“Q. In any event he was a man who was in Mr. Zimmerman’s office?

“A. Yes, that is right.

“Q. Now, at the time of these conversations in Zimmerman’s office, you were still continuing as president of the New York Thread Grinding Corporation? “A. Yes.

“Q. And you were still signing checks?

“A. Yes.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. How many people did you have working for you at that time? A. About 120.

“Q. Do you recall how long a period of time your meetings in Mr. Zimmerman’s office continued? A. I don’t get you.

“Q. Did the meetings in Mr. Zimmerman’s office continue for about two months or a month?

“A. Something like that. I don’t recall that. It was pretty long time, but how long I don’t recall.

“Q. Did Mr. Zimmerman explain to you that your wife was making a motion for temporary alimony? A. Yes.

“Q. What did he say about that?

“A. I don’t recall. He said she wanted to sue me for alimony, that is all.

“Q. Did he tell you that she was also bringing—suing for counsel fees? A. Yes.

“Q. Did he tell you that the action that had been brought by her was for a separation?

“A. Yes.

“Q. Did he tell you how much money Mrs. Woynicz was asking for?

“A. I think that was in that summons, whatever you call that.

“Q. And he told you the same figure that was mentioned in the paper?

“A. I don’t recall that, possibly, yes.

“Q. Well, did you know what figure was in the papers that were served?

“A. I’m not sure about that, I don’t know.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Did you read those papers that were served on you?

“A. If I read I couldn’t understand them.

“Q. Well, do you recall whether or not you read the papers at all? A. Not all.

“Q. Did you read part of the papers?

“A. Yes.

“Q. Did you understand from the papers that your wife wanted a separation? A. Right.

“Q. Did you understand from your reading of the papers that she was suing you for temporary alimony? A. Yes.

“Q. And that she wanted you to pay her temporary support? A. Yes.

“Q. And you knew that before you went to Zimmerman’s office.

“A. I am not sure about that. Probably he explained that to me.

“Q. Well, what phase of it did he explain to you?

“A. That she was suing me and I had to go to Court and he really frightened me up that I had been lost, they will take everything from me, so I knew that much.

“Q. Did you tell Mr. Zimmerman that you wanted to oppose the motion for temporary alimony? A. Yes.

“Q. You told him you wanted to fight it?

“A. Yes.

“Q. And you——

(Deposition of Leonard Woynicz Sianozecki.)

“A. I insisted on that.

“Q. And you told him you wanted to go to Court? A. Yes.

“Q. You told him you didn’t want to make any settlement? A. Absolutely.

“Q. You told him you wanted to contest the action? A. That is right.

“Q. You told those things to Mr. Zimmerman in his office? A. Yes, that is right.

“Q. Did you have any correspondence with Mr. Zimmerman? A. Not at the time.

“Q. When did you first have any correspondence with Mr. Zimmerman?

“A. Well, if you want to recall that, I tell you something——

“Q. No, the question is simple. When did you first have any written correspondence with Mr. Zimmerman?

“A. When after settlement only, not before. There was no written—before any—when the settlement come. When whoever that letter from Klaw come”—then there is some writing.

Mr. Weber: “Protesting.”

Mr. Riseley: (Continuing.)

“——protesting that my son”—then there is “took it,” [267 with a line drawn through it—“took the shovel and my wife demanded the shovel back and my son also, his own tree was growing, he took his tree and they demanded that tree. I told I

(Deposition of Leonard Woynicz Sianozecki.)

didn't take it. My son took, go ahead and take from him. That was the correspondence.

“Q. When did that take place, how long after this settlement?

“A. Well, probably when we moved, not really, not I but my children moved out from the house, that was two weeks or a week after they moved out.

“Q. I'll show you a paper Mr. Woynicz and ask you whether or not this bears your signature.

“(Witness examines document.)

“A. Yes, that is my signature.

“Q. Do you recall where you signed that?

“A. I don't remember the date.

“Q. Was it in the office of Mr. Zimmerman?

“A. Yes.

“Q. Do you recall who was present at the time?

“A. I don't remember.

“Q. Was Mr. Zimmerman present when you signed this? [268]

“A. Yes.

“Mr. Weber: I will ask that this be marked as Plaintiff's Exhibit 1 for identification.

“(The Notary then marked the document as Plaintiff's Exhibit 1 for identification and initialed it.)

“Q. I will show you this settlement agreement, Mr. Woynicz, marked Plaintiff's Exhibit 1 for identification and direct your attention to the name of

(Deposition of Leonard Woynicz Sianozecki.)

Joseph L. Simon as Notary Public in the acknowledgment and ask you whether that refreshes your recollection that Mr. Simon was present when you signed this agreement?

“(The witness examines document.)

“A. Possibly he was there when I signed—not possibly but probably he was there.

“Q. And was Mr. Zimmerman also present when you signed it? A. Yes.

“Q. Was anybody else present when you signed it? A. I don’t recall.

“Q. Do you recall Mr. Woynicz whether or not the agreement was shown to you on any day before you signed it? [269] A. Yes.

“Q. How many days before you actually signed the agreement was it first shown to you?

“A. I don’t know.

“Q. About three or four days?

“A. I don’t know.

“Q. In any event, it was a matter of some days?

“A. Some days, yes.

“Q. Now, between the time that you first saw the agreement, and the time that you signed it, were any changes made in the agreement?

“A. Only one change.

“Q. What change was that?

“A. She wanted my son Robert, was a minor, she wanted to come to see him and I told, she cannot see him because that was objection of my

(Deposition of Leonard Woynicz Sianozecki.)

daughter. The house, new house belonged to my daughter and she did not want to see——

“Q. And you told Mr. Zimmerman you wanted the agreement changed?

“A. Changed only that, that she cannot come.

“Q. To see the daughter?

“A. No, not the daughter, but she didn't care about the daughter, she wanted to see the boy. [270]

“Q. And you told Mr. Zimmerman to change that part of the agreement? A. Yes.

“Q. Were there any other changes in the agreement before you signed it?

“A. I don't recall any more.

“Q. Now, I'll show you Page 4 of the settlement agreement, Mr. Woynicz, marked Plaintiff's Exhibit 1 for identification and ask you whether or not that bears your initials 'L. W. S. ,' is that right? A. Yes.

“Q. And do you recall whether or not you put your initials at that point at the time you signed the agreement? A. Yes.

“Q. Was that to indicate your approval of the change as far as visiting your son was concerned?

“A. Yes.

“Q. Is that right? A. Yes.

“Q. Is that the change that you asked Mr. Zimmerman to make for you? A. Yes.

“Q. And at the time you put your initials [271] there, you understood that he was making that change pursuant to your request? A. Yes.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Were any other changes made in the agreement?

“A. I don’t recall any. Oh, yes wait a minute, it was they wanted us to move in a week’s time or something, wanted me to move. I couldn’t move you know. I couldn’t find a room. We bought the house, so I asked I think for three or four weeks, I don’t recall, but that is only changed from days to weeks. That was changed because we couldn’t find an apartment right away.

“Q. Now, when you signed this agreement marked Plaintiff’s Exhibit 1 for identification Mr. Woynicz, did you read it? A. I read partly.

“Q. Did you know that you were supposed to pay your wife \$50.00 a week by the terms of it?

“A. Yes.

“Q. Did you know that Mr. Klaw was to receive from you the sum of \$350.00 for lawyer’s fees?

“A. Yes, I paid.

“Q. And you paid it? A. I paid it.

“Q. And at the time you paid it to him you knew what it was for?

“A. Yes, that is right.

“Q. Now, did you know that you were supposed to give your wife a certain deed of a life interest on the Wellman Avenue property?

“A. Yes, I did.

“Q. And at the time you signed the agreement you knew that you were supposed to do it?

“A. Well, not the way what they did. That is

(Deposition of Leonard Woynicz Sianozecki.)

she is supposed to have right to one apartment as long as she lives. My kid was in the Army and I wanted for them when they come back. They had the right to move in there but instead of the apartment, they put the whole house, that only later when the boy come from the war I found out that he has no right to live there. That is the only time I find out what mistake I made because I am supposed to have that way so the kid when he come from the war, he has the place to live, but she refused to give him the apartment.

“Q. When did you first learn, Mr. Woynicz, that your wife was to get a life interest in the Wellman Avenue property under the agreement?

“A. After my boy come from the Army, from the [273] war, he was in the war for five and a half years, four and a half or five and a half. I was sure they had the right to move in there. I absolutely was sure all the time until he come there and she says, ‘No, you cannot move, that is my house.’

“Q. Mr. Woynicz, when you signed this agreement, what was to become of the separation action that your wife started against you?

“A. I don’t understand what you mean.

“Q. At the time you signed this agreement, what was your understanding as to the pending action brought by your wife?

“A. She is supposed to stop the papers.

“Q. And drop it? A. Yes.

“Q. And what was to become of her motion for

(Deposition of Leonard Woynicz Sianozecki.)

temporary alimony? Was that supposed to be dropped too?

“A. Supposed to be, only to come to the new agreement.

“Q. And at the time you signed this agreement, you knew that those two matters were to be dropped by your wife? A. Yes, that is right.

“Q. Now, do you have any recollection Mr. Woynicz, how long these negotiations lasted between your lawyer and your former wife’s lawyer?

“A. No, I don’t.

“Q. Was it a matter of several weeks?

“A. Quite a long time.

“Q. Were they bargaining back and forth?

“A. I don’t know. That was quite a long time. Mr. Zimmerman insisted on me to sign as soon as possible. I didn’t want the separation. I wanted reconciliation. I write to my friend, to my partners and we did everything possible to reconcile.

“Q. In other words you told Mr. Zimmerman that you were interested in a reconciliation?

“A. Yes, that is right.

“Q. You told him that before you signed the papers? A. Yes, that is right.

“Q. And——

“A. He insisted on signing because he said ‘You go to Court, you will be sunk,’ whatever that meant.

“Q. Did you tell Mr. Zimmerman to try to bring a reconciliation? [275]

“A. Yes, that is right, I did.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. And did he come back to tell you or did he tell you whether or not he had tried to bring about a reconciliation?

“A. He never had time. He was too busy a man. He never had time to do anything.”

The next four questions have got some markings around them.

Mr. Weber: I think they were eliminated.

Mr. Riseley: They were struck out.

Mr. Weber: Down to line 18. I think that is the last.

Mr. Riseley: I will skip from line 6 to line 18, then:

“A. He did not tell that to me he tried. He told—I told him to try but whether he did or not I don’t know. He was not interested in it. He said ‘That will be better for you, you will be better off.’ I am a family man, I’m not a bum. I wanted to keep my house and he insisted on that.

“Q. Now, Mr. Woynicz, at the time that you had this discussion with Mr. Zimmerman in connection with signing this agreement, did you have any talk with him about what was to happen to the payments of \$50.00 a week in the event that your wife remarried? A. I don’t know. [276]

“Q. Do you recall any discussion with Mr. Zimmerman about what was to happen to the payments of \$50.00 a week in the event that your wife died?

“A. I think in that event I would stop payments.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. And Mr. Zimmerman explained that to you?

“A. Yes.

“Q. Did you discuss with Mr. Zimmerman what was to happen to the weekly payment of \$50.00 a week in the event that your wife remarried?

“Mr. Styskal: I think that was asked and answered?

“Mr. Weber: Remarried, no.

“Mr. Styskal: Wasn't that the first question?

“A. That was the question.

“Mr. Weber: Read back the last part of the record, Mr. Reporter.

“(The Reporter read back the last part of the record.)

“Mr. Weber: Strike out the last question.

“Q. Don't you recall, Mr. Woynicz, that during this discussion with Mr. Zimmerman, he told you that under the agreement, in the event that your wife remarried, the payments of \$50.00 a week would stop? [277]

“A. Yes.

“Q. In your conversations with Mr. Zimmerman at the time this agreement was signed, did you have any discussion with Mr. Zimmerman as to what was to happen to your personal tools and books and other belongings at the Wellman house?”

“A. It was only discussed that much that we had been allowed to take our books and our clothes.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Mr. Zimmerman told you that?

“A. Well, I insisted on that. After all, the children are entitled to their clothes.

“Q. How about your personal tools?

“A. I didn’t have much. My boy had.

“Q. Did Mr. Zimmerman tell you that under the agreement, you had the right to take back these personal tools within six months?

“A. Six months”—then “nothing” is inserted in writing—“they took that right away, whenever they moved, my boy had a little experimental shop. He was in the Aviation Academy at that time and I had for him a little lathe and drill press and some tools and he was experimenting in the evening, so he had the right to take that.

“Mr. Styskal: Mr. Woynicz, may I suggest that you listen to the question more clearly. Mr. Weber [278] is asking you whether Mr. Zimmerman explained and told you these things, not whether you insisted.

“A. I think I insisted on that. He didn’t tell me.

“Q. (By Mr. Weber): You insisted on the tools being put in the contract?

“A. Yes, that only tools and clothes be taken, that is all. We even couldn’t take the spoons or anything.

“Q. Now at the time you signed that agreement, do you know whether or not Mrs. Woynicz had already signed it? A. I don’t know.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Well, she signed it after you, is that right?

“A. I think it was after. I don’t know.

“Q. At the time this agreement was signed by you, Mr. Woynicz, did you also write out a check to Mr. Klaw for \$350.00? A. Yes.

“Q. What was that \$350.00 for?

“A. For his fee, whatever it was.

“Q. Counsel fees, for representing your former [279] wife? A. Yes.

“Q. Did you also write out any check payable to the Plaintiff, your former wife, representing any of these \$50.00 payments? A. Yes.

“Q. How much?

“A. Whatever it was I don’t know. I don’t recall that, but I know it was all straightened up at that time, everything was straightened up.

“Q. Did you also execute a deed giving your wife a life interest in the Wellman property?

“A. Yes.

“Q. Was that signed at the same time you signed this agreement? A. The same time.

“Q. To whom did you give those other papers?

“A. What do you mean?

“Q. Did you give all the papers to Mr. Zimmerman that you signed?

“A. I—yes. I never saw Mr. Klaw. I’m sorry because he is a smart fellow. I would like to see a man like him. I mean it.

“Q. Well, you gave this agreement and the checks—— [280] A. To Mr. Zimmerman.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. And the deed to Mr. Zimmerman?

“A. Yes, that is right.

“Q. Now, after you signed these papers in Mr. Zimmerman’s office, how long after that did you make the next payment to Mrs. Woynicz?

“A. Until I think in May, 1947.

“Q. You made payments every week?

“A. Every week regularly ahead of time, even.

“Q. How did you make those payments, Mr. Woynicz? A. By checks.

“Q. Your personal checks? A. Yes.

“Q. Was it the New York Thread Grinding Corporation account or your personal account?

“A. No, my personal account.

“Q. On what bank?

“A. Manufacturer’s Trust Company.

“Q. What branch was it, do you know?

“A. It is on Broadway and Canal.

“Q. Broadway and Canal Street in New York City? A. Yes.

“Q. Do you have those checks with you? [281]

“A. No, not here.

“Q. Do you have them at home here?

“A. Yes.

“Q. By the way, have you told us your present home address? A. You want now?

“Q. Yes. A. 232 West Imperial Highway.

“Q. Is that in Los Angeles? A. Yes.

“Q. How long have you been living at that address? A. Since November 13, 1948.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Do you live there with your present wife?

“A. That belongs to her.

“Q. And when did you remarry?

“A. In September 19, 1948—no, October 19, 1948.

“Q. What is your present business address, Mr. Woynicz? A. 2731 Lincoln Boulevard.

“Q. Santa Monica? A. Santa Monica.

“Q. What is the name of your company?

“A. G. M. C. Tool and Die Company. [282]

“Q. Is that a partnership? A. Yes.

“Q. Consisting of whom?

“A. I had a partner, but just he couldn't stand no more, so he run away. I have another partner now and the name is Mr. Bernard Helms.

“(At this point an off-the-record discussion was held.)

“Q. Now, when you went to Mr. Small did you have any discussion with him about arranging a settlement or separation agreement to get rid of the separation action?

“A. I don't think so. He proposed, you know, to settle—he likes to settle out of court always.

“Mr. Styskal: Mr. Woynicz, recall the question. Mr. Weber's question was with respect to Mr. Small.

“A. I don't know. I don't remember.

“Q. (By Mr. Weber): Don't remember discussing with Mr. Small a possible settlement of the action that your wife brought?

(Deposition of Leonard Woynicz Sianozecki.)

“A. I don’t think so. The discussion was he wanted to represent me, but he said he cannot. He don’t handle such cases.

“Q. Don’t you remember in your discus- [283] sion with Mr. Small, you discussed with him offering the sum of \$30.00 a week in settlement? Don’t you remember that? A. No, I don’t.

“Q. In your discussions with Mr. Zimmerman, do you remember Mr. Zimmerman discussing with you what your earnings were at that time?

“A. Possibly, maybe not. I don’t recall.

“Q. Well, don’t you remember Mr. Zimmerman telling you that on a motion for temporary alimony, the amount of money that you were making was a matter of importance? A. Yes.

“Q. And don’t you remember you told Mr. Zimmerman how much money you were then earning as president of the New York Thread Grinding Corporation? A. Possibly I did.

“Q. Now, did Mr. Zimmerman explain to you that on motions for temporary alimony, the more money the husband earned the more money the wife was entitled to?

“A. Yes, he frightened me plenty.

“Q. He told you that? A. Yes. [284]

“Q. As a matter of fact, Mr. Zimmerman threatened you, didn’t he? He said, ‘Sign the agreement or else’?

“A. Not exactly he threatened. He threatened that I will lose in the court by any way. He said, ‘You have no legs to stand on in the court.’

(Deposition of Leonard Woynicz Sianozecki.)

“Q. As a matter of fact, Mr. Zimmerman told you that your wife would probably win the case?

“A. That is right.

“Q. And he told you it would be a good idea if you can bring about a reasonable settlement?

“A. Yes, that is right.

“Q. He recommended it highly?

“A. Yes, that is right.

“Q. When did you go to Florida, Mr. Woynicz? A. In January, 1947.

“Q. 1946?

“A. '47, right after New Year's.

“Q. Now, between the time that you signed this agreement and the time that you went to Florida, you had made all the payments of \$50.00 a week?

“A. Absolutely.

“Q. By your check? A. Yes.

“Q. And what were these \$50.00 payments? [285]

“A. What? I didn't get you.

“Q. What were these payments for that you made from the time that you signed the agreement to the time that you went to Florida?

“A. I am supposed to pay.

“Q. When for the first time—I'll strike that. When you say supposed to pay, you mean under the agreement? A. Yes.

“Q. When for the first time did you send any kind of a letter to your former wife or to her attorney?

(Deposition of Leonard Woynicz Sianozecki.)

“A. It was, letter was sent by Mr. Helliwell in Miami.

“Q. Mr. Woynicz, I show you what appears to be the original letter——

“(At this point an off-the-record discussion was held.)

“Q. ——sent by the law firm of Bouvier, Helliwell and McCaul, dated March the third, 1947, and is that the letter to which you refer?

“(Witness examines document.)

“A. Yes.

“Q. Now, as far as you know, was any other letter sent by you or by any one on your behalf to Mrs. Woynicz by Mrs. Woynicz' lawyer, prior to this [286] letter of March 3, 1947?

“A. I don't think so.” Then there is something written in there. I think it is, “I recall there was many letters.”

“Mr. Weber: I ask that this be marked as Plaintiff's Exhibit 2 for identification.

“(The notary then marked the document as Plaintiff's Exhibit 2 for identification and initialed it.)

“Q. Did Mr. Helliwell show you this letter before he sent it?

“A. I don't recall, but I think he did.

“Q. By the way, Mr. Woynicz, during all the

(Deposition of Leonard Woynicz Sianozecki.)
negotiations leading up to the settlement agreement,
you did not see either Mr. Klaw or the Plaintiff?

“A. I never saw either one. I’m sorry I did not.
Maybe it would not be calamity like that.

“Q. I’ll show you schedule or Exhibit B attached
to the Complaint and ask you whether or not this
correctly sets forth all of the payments of money
made by you to your wife commencing April 9,
1947?

“(At this point an off-the-record discussion
was held.)

“Mr. Weber: It is stipulated by Counsel
that [287] a blank space be left to enable the wit-
ness to answer the question last propounded by
insertion thereof at the time of executing this depo-
sition.

“Mr Styskal: So stipulated.

“(The following blank spaces were left for
the witness to insert the information as re-
quested above.)

“Answer: Yes, that is correct.

“Q. (By Mr. Weber): Will you also tell us the
date of your last weekly payment of \$50.00 to your
wife?

“A. It was October when I left Miami. I left
money with Mr. Helliwell.

“(At this point an off-the-record discussion
was held.)

(Deposition of Leonard Woynicz Sianozecki.)

“Mr. Weber: The same stipulation with respect to this last question. A blank space is to be left to enable the witness to insert the answer at the time of executing the deposition?

“Mr. Styskal: So stipulated.

“(At this point an off-the-record discussion was held.)

“(The following blank space was left for the witness to insert the information as requested above.) [288]

“A. October, 1948.

“Q. (By Mr. Weber): Now, do you recall any discussion with Mr. Helliwell in Florida about giving Mr. Klaw permission to see your income tax returns for certain years?

“A. Yes, all the years I told from 1940 to the last date, December, '46.

“Q. And do you recall what Mr. Klaw's purpose was in seeking to examine those tax returns?

“A. To find out my earnings.

“Q. And you authorized Mr. Helliwell to give Mr. Klaw that permission? A. I did.

“Q. Was that in November, 1947? A. Yes.

“Q. Mr. Woynicz, do you recall in your discussion with Mr. Zimmerman at or about the time you signed the settlement agreement, there was some discussion about the fact that your earnings at that time were most unusual because of the war situation? Do you remember that discussion?

(Deposition of Leonard Woynicz Sianozecki.)

“A. I don’t quite understand you.

“Q. Well, maybe I can rephrase it. It is not too clear. Do you recall at the time that you were [289] visiting Mr. Zimmerman’s office, when the settlement agreement was being negotiated, there was a discussion with Mr. Zimmerman in which there was some mention of the fact that your earnings at that time were unusually high because of the war situation? A. Yes.

“Q. And did you explain that to him?

“A. Yes.

“Q. And was there also some discussion at that time about the fact that since the earnings were unusual, they should not be taken as a basis for alimony?”

The answer has been marked out and written in:

“A. Yes, but he insisted on life payments.

“Q. Well, what did Mr. Zimmerman say to you at the time that you told him your earnings at that time were simply—were unusual because of the war situation?

“A. What do you mean ‘unusual’? I was paying one-third what I was making. I was making \$150.00 a week and I was paying her \$50.00 a week. Later I was making better money, yes. Mr. Klaw has the same thing. Here is my earnings (indicating a document). Mr. Klaw has the same thing.

“Q. Mr. Woynicz, since 1942, have you consulted [290] any doctors in reference to your mental condition? A. Yes.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. What doctors have you consulted?

“A. What Doctor Anthony (spelling) B-O—give me a paper and I’ll write it.

“(Witness writes on piece of paper.)

“(Spelling) B-O-G-A-T-K-O.

“Q. Where is he located?

“A. 139 East 66th Street.

“Q. New York City? A. Yes.

“Q. When did you first go to him?

“A. He is my family doctor. He was always—he operate on me three times.

“Q. Oh, is he a general practitioner?

“A. Yes.

“Q. He was your family doctor? A. Yes.

“Q. When did you see him last?

“A. What do you mean last?

“Q. When did you last go to him for any treatment? A. Before I went to Florida.

“Q. Was it sometime in the early part of 1947? [291]

“A. No. ’46. Maybe ’47, because I left I think—maybe it was in January.

“Q. What did you see him for?

“A. Just to tell ‘goodbye’ and get a checkup.

“Q. And was that the last time you saw him?

“A. Yes, and he sent me to specialists. I don’t recall, Dr. Niles or something like that, for nervous——

“Q. When was that?

(Deposition of Leonard Woynicz Sianozecki.)

"A. I don't know. It was 1945 or something. I just was going to pieces.

"Q. In 1945?

"A. I think in 1945. I don't recall.

"Q. Is Dr. Niles located in New York City?

"A. Yes, somewhere on 54th Street. I don't recall.

"Q. Does he spell his name (spelling) N-I-L-E-S? A. I think so.

"Q. What is his first name?

"A. Harold. On his advice I went to Florida. He said, 'You have to go to some warm climate or you will go to pieces.'

"Q. And Dr. Niles recommended that you go to Florida? [292]

"A. Yes, recommended a long time to go, but I couldn't. When I had the shop I couldn't go.

"Q. You saw Dr. Niles before, shortly before you went to Florida?

"A. Not exactly shortly, about a year before.

"Q. About a year before? A. Yes.

"Q. And between 1942 and 1946 did you go to any doctors for——

"A. You see I had what you call lumbago, whatever it is. I couldn't walk, pain. I went to Dr. Krieger and Dr. Niles and that is the only three doctors that I went to.

"Q. Who was Doctor Walter S. Baro?

"A. I don't know." Then written in, "I forgot the name. I was not sick only for checking."

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Have you ever seen a Dr. Baro?

“A. No.

“Q. Now before your wife started the action for separation in 1942, Mr. Woynicz, do you recall whether or not you received a letter from Mr. Klaw, her Attorney, advising you that such an action was about to be brought? A. Nothing.

“Q. You don’t recall? [293]

“A. He did not send. Just the same like you, Mr. Weber, the same was, just lightning struck from clear sky,”—“from clear sky” is written in—“that is all.

“Q. At the time you spoke to Mr. Zimmerman in connection with the signing of the settlement agreement, was there any discussion between you and him as to what was to happen if times went bad?

“A. Yes. I told him and he said——

“Q. What did you tell him?

“A. How I’d be able to make \$50.00 payments.

“Q. And what did Mr. Zimmerman say?

“A. He said ‘That is the only way out, the only way forever after.’ He absolutely refused to make any limit.

“(At this point an off the record discussion was held.)

“Q. By the way, Mr. Woynicz, prior to the time you signed this separation agreement, you had entered into a number of real estate transactions?

“A. Yes.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. About how many would you say?

“A. I told you I bought a farm.

“Q. Is that the same property that was located in South Brunswick, New Jersey or is the South Brunswick [294] property some other property?

“A. There was only one property was the farm, in Deans and the house in Lakewood and that is all.

“Q. And you also had some property in Mastie Beach? A. Yes. There was lots there.

“(At this point an off the record discussion was held.)

“Mr. Weber: I have no further questions.

“Cross-Examination

“By Mr. Styskal:

“Q. Mr. Woynicz, you say you entered into the corporation known as New York Corporation, Grinding Corporation in 1942? A. 1940.

“Q. 1940? A. Yes.

“Q. And you were president of that corporation?

“A. Yes.

“Q. In 1942 you were president of the corporation? A. Yes.

“Q. Did you have an office?

“A. No, it was a general— [295]

“Q. Did you work in the office?

“A. Just I was working all the time in the shop.

“Q. You were working all the time in the shop?

“A. It was just only for signature. I used to

(Deposition of Leonard Woynicz Sianozecki.)

come to the office only for signature, checks, some paper.

“Q. Somebody would bring you in to sign these documents? A. Yes.

“Q. Who was running the office?

“A. Mr. Barudin naturally, and Barudin——

“Q. And you were working at all times in the shop? A. Yes.

“Q. Were you paid shop wages? A. Yes.

“Q. You were? A. You mean the money?

“Q. Yes.

“A. No, I paid—cashier, the girl.

“Q. Were you paid on an hourly basis for working in the shop?

“A.” —this is written in—“I did not [296] understand. I thought they ask about working men. Mostly hourly for working but the foremen was all contractors.

“Mr. Weber: No, he means what was your pay? His question is what pay were you getting?

“A. Just flat pay.

“Q. (By Mr Styskal): A salary then?

“A. Yes.

“Q. Did you negotiate contracts that came into the shop?

“A. We discussed the price with Mr. Barudin. Barudin signed as an educated man. He was a Cooper Union graduate. One of the best schools. He was an engineer. I was practically you know. I give the practical and he was the technical. He was

(Deposition of Leonard Woynicz Sianozecki.)

real good partner. He had been—was my partner three times.”

Then something is stricken out. “I would like to have him.

“Q. Mr. Woynicz, these contracts that came in, you signed some of them, did you?

“A. Some of them important, like you see the president had to sign the government contracts. The others Barudin used to sign. [297]

“Q. Now, those that you signed, did you read them?

“A. Well, he read to me. He explain to me in Russian.

“Q. He explained that to you in Russian?

“A. Yes.

“Q. And then you signed on his advice to sign?

“A. Yes.

“Q. And all during the year of 1942——

“Mr. Weber: These are contracts other than the one suit?

“Mr. Styskal: Yes, that is what I’m talking about. The contracts that came into the corporation.

“Mr. Weber: Well, actually you are travelling far afield, aren’t you?

“(At this point an off the record discussion was held.)

“Q. (By Mr. Styskal): Mr. Woynicz, you did go to a Doctor in Los Angeles, didn’t you just recently? A. No, I did not.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. Didn’t you go to a Doctor in the Subway Terminal Building?

“A. No, my wife was every week but I didn’t. Somehow after Florida I cleared myself of everything. [298] I just got cured of everything, thanks to God I don’t need Doctor now.

“Q. Didn’t you go to a Doctor that was suggested—didn’t Mr. Riseley send you to a Doctor?

“A. Oh, yes, that is right. It slipped out of my mind. He just took the records of what was with me during the period of 1942, and check up.

“Q. And do you remember his name?

“A. Some Italian name.

“Q. Could it be (spelling) B-A-R-O?

“A. Yes.

“Q. Now, these property transactions, real estate property transactions that you had were prior to your agreement with your former wife?

“A. Yes.

“Q. How long a time prior to ’42 did you enter into those transactions?

“A. Well, one was in 1919 in January, 1919, and another in January, 1944 or ’44, something like that, ’44, I think, ’44, because I had the farm exactly 5 years. Then I bought the house in Lakewood, New Jersey, and I traded that for—in 1932 or ’31, something like that, to the house in New York on 2929 Wellman Avenue, the one she has now. [299]

“Q. When was that last transaction, ’31 did you say?

(Deposition of Leonard Woynicz Sianozecki.)

“A. ’31 or ’32. I don’t know. It was in December.

“Q. Well, then, it was approximately ten years was the last real estate transaction you had prior to the time of your separation with your wife?

“A. Yes, that is right. Then later I bought adjoining lots where the house, I bought big lot, very big lot adjoining the house she had.

“Q. When was that Mr. Woynicz?

“A. On 1941 or something like that. I don’t recall.

“Mr. Styskal: I don’t think there are any further questions.

“Redirect Examination

“By Mr. Weber:

“Q. In connection with Mr. Barudin, you assisted him in estimating the cost or price for certain work?

“A. Yes, and the way to make it. I was a practical man there working 49 years.

“Q. And this visit that Mr. Riseley suggested, that is during the pendency of this lawsuit, isn’t it?

“A. Yes, that is right.

“Q. Did you see any doctors in Florida?

“A. Yes.

“Q. When did you last see a doctor in Florida?

“A. Just before I left Florida, Doctor Snow.

“Q. Doctor Snow? A. Yes.

“Q. Do you know what his first name is?

(Deposition of Leonard Woynicz Sianozecki.)

“A. I wouldn’t know.

“Q. What city is he located in?

“A. Hollywood.

“Q. Hollywood, Florida? A. Yes.

“Q. Does he spell his name (spelling) S-N-O-W?

“A. Yes.

“Q. Do you recall the month in which you left Florida? A. In october.

“Q. 1947? A. 1948.

“Q. 1948?

“A. Yes, I left Florida in October, 1948.

“Q. In other words you were there almost two years? [301]

“A. Yes, that is right. If you need doctor, you go to Doctor Snow, he is a great man.

“Q. Is Doctor Snow a general practitioner or is he a specialist?

“A. He is in the Hollywood Clinic. He is a staff doctor of the Hollywood Clinic.

“Q. As far as you know he is not a specialist?

“A. I don’t think so. At the clinic.

“Q. What particular ailment did you consult him about?

“A. Sciatica and lumbago and the heart. He cured me of everything.

“Q. I think I asked you this before but I’m not certain. You saw Doctor Bogatko in 1945?

“A. 1946.

“Q. And was that the first time you saw Doctor Bogatko?

(Deposition of Leonard Woynicz Sianozecki.)

“A. What do you mean the first time?

“Q. When prior to 1946 did you see Doctor Bogatko? A. 1911.

“Q. In other words between 1911 and 1946.

“A. I know him when he was a student yet.

“Q. I mean when did you go to see him about your condition before 1946? [302]

“A. He was taking care of me all the time.

“Q. In connection——

“A. Whatever ailment I had. He operated on me three times. He is a surgical doctor.

“Mr. Weber: That is all.

“Mr. Styskal: No further questions.

“Mr. Weber: I'll stipulate the deposition may be signed before any Notary Public.

“Mr. Styskal: So stipulated.

“Mr. Weber: I have no further questions but I want to keep it open pending the opportunity to complete the two answers and the examination of the checks.

“Mr. Styskal: So stipulated.

“/s/ LEONARD WOYNICZ
SIANOZECKI,
“Witness.”

I might as well pick up the first part that I haven't read of the deposition. Then that will make this deposition complete.

The Court: Very well.

Mr. Riseley: Going back to the beginning of the deposition, having started previously on page 11, this is:

“Deposition of Leonard Woynicz Sianozecki, taken on behalf of the Plaintiff, Tuesday, June 28, 1949, [303] at 2:00 o’clock P.M. at 208 South Beverly Drive, Beverly Hills, California, pursuant to stipulation attached hereto, before David Newman, Notary Public.”

“Los Angeles, California, Tuesday, June 28, 1949, 2:00 P.M.

“LEONARD WOYNICZ SIANOZECKI

“Called as a witness by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

“By The Reporter: What is your full name, please?

“By The Witness: Leonard Woynicz Sianozecki.

“Direct Examination

“By Mr. Weber:

“Q. Mr. Woynicz, you are the Defendant in this case? A. Yes.

“Q. Has your Attorney explained to you what a deposition is?

“A. Just to give—just to answer the questions that you ask. [304]

“Q. Did he explain to you this is like giving testimony in Court? A. Well, yes.

“Q. Mr. Woynicz, if there is any question that

(Deposition of Leonard Woynicz Sianozecki.)

you don't understand, you will please say so and I will try to reframe the question. A. O.K.

“Q. How old are you? A. Sixty-four past.

“Q. When did you come to America?

“A. September 12, 1911.

“Q. Did you settle in New York?

“A. First in Elizabeth, New Jersey, and then other parts of New Jersey, Deans, New Jersey, then Lakewood, New Jersey, then in New York.

“When did you first go to school in America?

“A. 1911.

“Q. What school did you go to?

“A. It is Elizabeth No. 1.

“Q. Public School No. 1 in Elizabeth, New Jersey. A. Yes.

“Q. And how long did you go to school there?

“A. Three winters of night school, 1911, 1912 and 1913.

“Q. And what school did you go to after that?

“A. I didn't go to no school no more. I couldn't go because then I had obligation. My sister came 1913, and 1914 come war and come her husband, my sister's husband.

“Q. And after you went to Public School No. 1 in Elizabeth, New Jersey, you went to work?

“A. I was working all the time. I had been working for Singer Sewing Machine Company.

“Q. When did you first go to work for Singer Sewing Machine? A. In December, 1911.

“Q. How long did you work for them?

(Deposition of Leonard Woynicz Sianozecki.)

“A. Until March or April, 1915.

“Q. What sort of work did you do?

“A. Tool maker.

“Q. And for whom did you work after you left Singer Sewing Machine?

“A. Then Modern Machinery Company. Altogether it was about sixteen tool makers, we come together and we organize a company named Modern Machinery Company in New York. [306]

“Q. When was that company organized?

“A. 1915.

“Q. Did you organize that company?

“A. No, I joined them when they was organized already.

“Q. What sort of work did you do for them?

“A. Tool maker, the same thing as the Singer Sewing Machine.

“Q. How long did you work for them?

“A. When the Revolution was in Russia first then they left for Russia, the whole company.

“Q. Mr. Woynicz, how long did you work for the company?

“A. I can't remember. Do you remember what time the—after the Czar was in Russia?

“Q. 1917? A. I think was 1917.

“Q. And then did you go to work for somebody else?

“A. Then for a while I was not working. Then we come together, some of them didn't go to Russia so we organized another company.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. You and who else?

“A. Well, ten altogether was.

“Q. What was the name of that company? [307]

“A. New York Thread Grinding Company.

“Q. When was that company formed?

“A. I think 1917. I don't recall but about 1917,
I think so.

“Q. Were you one of the owners of that company?
A. Yes. That was a corporation.

“Q. A corporation? A. Corporative.

“Q. Corporation?

“A. Not corporation, cooperative. We had no
hired men.

“Q. Were you an officer of that company?

“A. Well, if you call that you would have to—
I was president of that company.

“Q. How long were you president?

“A. Until it dissolved. The company was dissolved I think in the end of 1919, something like that.

“Q. Then what did you do after that?

“A. Then I bought myself a farm in Deans, New Jersey, what I told you.

“Q. Did you do farming after that?

“A. Yes.

“Q. How long?

“A. For five years exactly. [308]

“Q. What happened after that?

“A. And I sold the farm and bought the house

(Deposition of Leonard Woynicz Sianozecki.)
in Lakewood, New Jersey.

“Q. When did you go into business thereafter?

“A. I was there. I went back to New York in December, 1925.

“Q. Did you go into business?

“A. Not yet. I was working for one of my former partners, Joseph Kucera.

“Q. What sort of work did you do for him?

“A. The same thing, tool making.

“Q. Did you have an interest in that business?

“A. No. He died in June, 1926.

“Q. Then what did you do?

“A. You see the company was in terrible condition. He just simply neglected everything.

“Q. Did you take over the company?

“A. So I bought that company from the widow. I think I paid some \$200.00.

“Q. What is the name of the company?

“A. Radio Production Machinery Company.

“Q. Were you the sole owner of that business?

“A. After death, yes.

“Q. How long did you operate that business?

“A. I had for a while a partner but I think only [309] about six months because the crash come 1930 and he quit right away. We lost money in the bank so he quit instantly and I was keeping on until 1940.

“Q. And you were the sole owner from the time that he dropped it in 1930 until 1940?

“A. Yes, sir.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. What happened to the business in 1940?

“A. In 1940 my former partner of N. Y. T. G. Co., first that we had partner, they come to me to organize another company.

“Q. What was the name of that company?

“A. The same thing, New York Thread Grinding, was not company, was a corporation.

“Q. Were you one of the organizers of that corporation?

“A. Well, six of us were altogether.

“Q. Did you become an officer of that corporation?

“A. Yes, the same like we had before, the same, Mr. Barudin was my partner, the third time we become partners, the third time.

“Q. What office did you hold?

“A. The same thing, president and Barudin was vice-president. [310]

“Q. When did you become president, in 1940 when it was organized?

“A. Yes, that is right.

“Q. How long did you remain president?

“A. Until 1946.

“Q. What happened in 1946 to the corporation?

“A. Mr. Barudin got very sick. He got heart trouble and one partner died so that was all lost.

“Q. Was the corporation dissolved?

“A. Dissolved entirely. December, 1946, it was entirely lost, everything lost.

“Q. Now, what were your duties from 1940 to

(Deposition of Leonard Woynicz Sianozecki.)

1946 in connection with that corporation?

“A. I was just manager and in the name I was president, and I was signing checks, I was hardening material, and working in shop.

“Q. You were the general manager of the business?

“A. Well, inside we will say.

“Q. And in charge of the shop?

“A. Yes, that is right.

“Q. Did you also sign checks?

“A. Yes, I was signing checks and Mr. Goncharoff and another fellow—he was signing the checks with me.

“Q. Now, did you sign contracts for the [311] corporation during that time?

“A. No, mostly Mr. Barudin was because he was the outside man.

“Q. He handled——

“A. Some government contracts I had to sign.

“Q. How many people did you have working for you?

“A. The most, the biggest amount was 270.

“Q. And these people were in the shop?

“A. Yes.

“Q. And you were in charge of them?

“A. Yes. You see in the night time was Mr. Goncharoff——

“Q. Was this corporation the New York Thread Corporation dissolved before your wife brought an action against you? A. No.

(Deposition of Leonard Woynicz Sianozecki.)

“Q. In 1946 or after?

“A. No, after. You mean this action?

“Mr. Weber: Strike that last question. I have got the last two mixed up.

“Q. Now at the time that your wife started an action against you in 1942 you were then working?

“A. In the shop.

“Q. Or associated with the New York Thread Grinding Corporation, is that right?

“A. Yes, that is right.

“Q. And where were you living at the time?

“A. Living at 2929 Wellman Avenue.”

And that is where I started to read the deposition before.

The Court: Now, the court understands that all depositions that were presented at the time of the trial in chief and on the motion have been read to the court; is that correct?

Mr. Riseley: Yes, your Honor.

The Court: I was wondering whether we can get through with this motion this afternoon.

Mr. Weber: My reply will take less than five minutes.

The Court: Very well, if we can. But I wanted to say if we could not, we could recess.

Mr. Weber: I have another court engagement on Monday.

The Court: Very well, if it will not take long. Go ahead.

Mr. Weber: I have listened for several hours to the reading of the depositions, and I can best summarize them by quoting your Honor's language voiced at the end of the trial right from the bench, after your Honor had heard all the testimony and seen all the exhibits. I would like to borrow the language of the court that if there be any doubt that Mr. Woynicz knew exactly what was going on in the course of these negotiations, that he was making a separation agreement, that it involved alimony, and that his wife was supposed to drop the action, that he made suggestions to change the contract, in fact, he insisted on certain modifications and revisions, that he paid checks and issued them and knew what they were for, and knew at all times what was going on, and if there was any question it was dissolved by the four years continuous payments which he admittedly knew were made in pursuance of the agreement.

Counsel talks about the New York law and separation agreements. I am not going to burden the court with a lot of cases, but I will take time to read an excerpt from the case of *Goldman v. Goldman*, which makes it very clear that where parties have separated, as they were here, or where the wife was suing the husband, as we have here, there is no question but what agreements of this kind may be validly entered into between the husband and wife. I quote at page 300. This is a case that has been cited repeatedly in the New York cases, where this is said:

“ . . . Such agreements, lawful when made, will be enforced like other agreements unless impeached or challenged for some cause recognized by law. It is not in the power of either party acting alone and against the will of the other to [314] destroy or change the agreement.”

Here we have a defendant, who, after making these payments for so many years, at a time when he finds it convenient goes down to Florida in January of 1947, establishes his residence, and then for the first time sends a letter to his cast-off wife of 26 years, and for the first time repudiates the agreement, after he has recognized and paid on it for four years, and doesn't say anything about mental incompetence. Then when he succeeds in getting an ex parte divorce, then he comes out to California, where we catch up with him. He makes no payments since October, 1948, and then he comes in and asks the court to destroy an agreement solemnly entered into by a president of a corporation, where he participates in the negotiations and pays checks under it for four years. We submit that would be a gross injustice, and the decision of the court is eminently sound.

The Court: Do you wish to reply?

Mr. Riseley: In these depositions there were several inconsistencies. The glaring one was the testimony of Mr. Simon to the effect that Mr. Zimmerman told the defendant that he was sure to lose. And Mr. Zimmerman consistently denies that in his deposition, four or five times, that he ever told the

defendant, "You have no leg to stand on at all. You will be sunk if you go to court," while Mr. Simon in his deposition says that he did tell him that. [315]

There is another point I noticed in reading these depositions. It has been put to the court, and I think Mr. Zimmerman would have us believe in his deposition that he prepared the property settlement agreement, and yet in Klaw's deposition he says that he, Klaw, prepared it, and, finally, in his deposition says that Simon prepared the property settlement agreement. That might be a question of memory. However, if we are going to attach any credibility at all to the defendant's testimony, what about these Moscow trials? As I said before, he has repeatedly said in his deposition, and he says in his testimony that he said, "Let it be Moscow trial," that he had this insane delusion, if you please, about the Moscow trials.

Did he sit up and dream up this story, that if you go to court nobody will believe your partners or your employees? If you go to court, nobody will believe your daughter, or the girl you will marry? Did he have a hallucination, or did the lawyers tell him that? If the lawyers told him that, they persistently deny it, and their testimony isn't to be trusted. If they didn't tell him that, he must have been having hallucinations. Now, I don't know, and I am not familiar enough with that type of particular insanity. I have seen the type of insanity where a man gets some big ideas like the Moscow

trials, and everybody that he contacts knows he has a quirk on Moscow trials, or whatever it is. [316]

I personally think, and still think, that at the time the defendant executed the agreement he was of unsound mind, that the agreement was not fairly entered into under the circumstances, that there was undue influence and over-reaching on the part of the plaintiff in obtaining this agreement, and whether the overreaching was directly or indirectly through the defendant's attorney doesn't make any difference in this type of agreement. This isn't an ordinary contract. This is an agreement between a husband and wife, subject to the statutory presumption that it is valid, and every state has that presumption, and our own California Code says that the husband and wife may contract on certain subjects, and one of them is separation, subject to the provisions all through their relationships, that you can't have any overreaching in that kind of an agreement. I feel in this agreement there was an overreaching as to an incompetent person, and that he was taken advantage of, sorely taken advantage of, and to enforce this agreement under this evidence would be a gross injustice.

Thank you, your Honor, for your kind consideration.

The Court: On the present motion for a new trial the court has been unable to discover any newly discovered evidence presented on this motion which would change or warrant the court to change its conclusion at the close of [317] the trial. The

court reached its conclusion at the close of the trial that the defendant here now involved was competent, that he was represented by counsel, that both sides were, and that the agreement which they made and which is involved in this action was valid and binding on the parties. There is no reason presented to the court at this time why the conclusion reached at the close of the trial should be changed. The situation appears to be the same on this motion for a new trial, so far as this record is concerned. That being the conclusion of the court now, the motion for the new trial will have to be denied.

You will have to prepare a formal order.

Mr. Weber: Does the court desire a formal order or a minute order?

The Court: We generally do, as a practice, but the clerk's minutes will show it, I suppose.

The Clerk: I think the minute order is sufficient, your Honor.

The Court: Whatever the practice is. The order is now made by the court.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the

above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of May, A. D., 1950.

/s/ MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: Filed May 10, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 57, inclusive, contain the original Amended and Supplemental Complaint; Exhibit A to the Original Complaint; Substitution of Attorneys for Defendant; Stipulation and Order—Answer to Complaint to be Deemed Answer to Amended and Supplemental Complaint; Answer; Stipulation and Order Amending Complaint; Memoranda Prior to Trial (Defendant's); Motion by Defendant to Amend Findings and to Make Findings More Certain and Objections to Findings; Motion for New Trial; Findings of Fact and Conclusions of Law; Judgment for Plaintiff after Trial; Notice of Appeal; Designation of Points on

Appeal and Designation of Record on Appeal and a full, true and correct copy of Minute Order entered March 24, 1950, which, together with original Reporter's Transcript of Proceedings on March 7 and 24, 1950, and original plaintiff's exhibits Nos. 1 to 13, inclusive, and original defendant's exhibit A, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23 day of May, A. D., 1950.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12555. United States Court of Appeals for the Ninth Circuit. Leonard Woynicz, also known as Leonard Woynicz Sianozecki, Appellant, vs. Alexandra Woynicz, also known as Alexandra Woynicz Sianozecki, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 24, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12555

ALEXANDRA WOYNICZ, also known as ALEX-
ANDRA WOYNICZ SIANOZECKI,

Appellee,

vs.

LEONARD WOYNICZ, also known as LEONARD
WOYNICZ SIANOZECKI,

Appellant.

APPELLANT'S
STATEMENT OF POINTS

To the Clerk of the above-entitled Court:

Appellant designates the following as points to
be relied upon in taking this appeal:

(a) That the agreement sued upon is contrary to
public policy and unenforceable at law or equity;

(b) That the Amended and Supplemental Com-
plaint does not state facts upon which relief can be
granted;

(c) That the evidence is insufficient to support
either the findings or the judgment;

(d) That the trial court erred in finding as to
mental condition contrary to the uncontradicted tes-
timony of an expert;

(e) That the trial court erred and failed to

recognize the shifting of burden of proof on prima facie incompetency being shown by husband;

(f) That the court erred in failing to require plaintiff to show that the purported separation agreement sued upon was fair and reasonable and not obtained by fraud, duress, or overreaching;

(g) That the findings are insufficient to support the judgment;

(h) That the findings are objectionable in that they are too indefinite and do not comply with Rule 15, FRCP;

(i) That the court erred in failing to consider common law and statutory presumptions regarding the invalidity of transactions between husband and wife;

(j) That the court erred in refusing to consider common law and statutory distinctions between total insanity and unsoundness of mind;

(k) That the court erred in refusing to consider the effect of defendant's letter of rescission;

(l) That the court erred in refusing to grant a new trial;

(m) That the court erred in refusing to amend findings and in refusing to make findings more certain;

(n) That the court erred in that unmerited inferences were drawn from the evidence as to the

effect of payments by husband during period of incompetency.

Dated May 29, 1950.

/s/ JERRY B. RISELEY,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 2, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Appellant designates as portions of the record, proceedings and evidence to be contained in the record on appeal, the following:

- (a) Amended and Supplemental Complaint;
- (b) Substitution of Attorneys—defendant;
- (c) Stipulation—Answer to Complaint to be Deemed Answer to Amended and Supplemental Complaint;
- (d) Answer;
- (e) Stipulation Amending Complaint;
- (f) Entire Exhibit A of Complaint;

- (h) Findings of Fact and Conclusions of Law;
- (i) Motion by defendant to Amend Findings and to Make Findings More Certain and Objections to Findings and Minute Order denying same;
- (j) Motion for New Trial and Notice of Motion for New Trial and Minute Order denying same;
- (k) Reporter's Transcript of Proceedings, pp. 1 to 318, incl.;
- (l) All exhibits introduced in evidence including all depositions;
- (m) The Judgment;
- (n) Notice of Appeal;
- (o) This Designation;
- (p) Appellant's Statement of Points on Appeal; Notice of Appeal;
- Clerk's Certificate.

Dated May 29, 1950.

/s/ JERRY B. RISELEY,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 2, 1950.

No. 12555

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

LEONARD WOYNICZ, also known as Leonard Woynicz
Sianozecki,

Appellant,

vs.

ALEXANDRA WOYNICZ, also known as Alexandra Woynicz
Sianozecki,

Appellee.

APPELLANT'S OPENING BRIEF.

JERRY B. RISELEY,

812 Bartlett Building, Los Angeles 14,

Attorney for Appellant.



TOPICAL INDEX.

	PAGE
Jurisdictional statement	1
The pleadings	1
Statement of the case.....	2
Summary	2
Detailed statement of case.....	4
Specification of errors.....	12
In regard to the incompetence of defendant.....	12
In regard to defendant's contentions that the agreement was contrary to public policy.....	12
In regard to the findings and conclusions.....	13
Arguments—Incompetence of defendant	15
Argument as to Specification No. 1.....	15
Effect of uncontradicted expert medical evidence.....	15
Argument as to Specification No. 2.....	18
Argument as to Specification No. 3.....	20
Argument as to Specification No. 4.....	20
Arguments—Public policy	22
Argument as to Specification No. 5.....	22
Argument as to Specification No. 6.....	22
Argument as to Specification No. 7.....	23
Argument as to Specification No. 8.....	23
Arguments—Findings and conclusions.....	24
Argument as to Specification No. 9.....	24
Argument as to Specification No. 10.....	27
Argument as to Specification No. 11.....	28
Argument as to Specification No. 12.....	29

ii.

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Aidkens v. Roberts, 164 N. Y. Supp. 502.....	19, 20
Anglo-California Bank v. Ames, 27 Fed. 727.....	28
Armstrong v. Armstrong, 1 N. Y. Supp. 529.....	22
Beard v. Beard, 65 Cal. 354.....	23
Berg v. Berg, 366 Ill. 228, 8 N. E. 2d 623.....	22
Brooks Bros. v. Brooks Clothing Co. of Calif., Ltd., 5 Fed. Rules Dec. 14.....	25
Carr v. Sacramento C. & P. Co., 35 Cal. App. 439, 170 Pac. 446	18
Coakley v. Coakley, 163 Misc. 867, 293 N. Y. Supp. 421.....	19
Dampskibs Aktieselsk Orient v. W. R. Grace & Co., 273 U. S. 748, 47 S. Ct. 449, 71 L. Ed. 872.....	29
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.....	15
Gatliff Coal Co. v. Cox, 142 F. 2d 876.....	22
Helvering v. Leonard, 60 S. Ct. 780, 310 U. S. 80, 84 L. Ed. 1087	23
Kelley v. Everglades Drainage District, 319 U. S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485.....	27
Knapp v. Imperial Oil & Gas Products Co., 130 F. 2d 1.....	26
Kraunz v. Kraunz, 293 N. Y. 152, 56 N. E. 2d 90.....	23
Lake v. Lake, 136 App. Div. 47, 119 N. Y. Supp. 686.....	28
Levey v. Minott, 214 App. Div. 192, 211 N. Y. Supp. 883.....	16
Linn v. Blanton, 111 Kan. 743, 208 Pac. 616.....	29
Livingston v. Safe Dep. & Trust Co., 157 Md. 492, 146 Atl. 432	20
Mantonya v. Bratlie, 33 Cal. 2d 120, 199 P. 2d 677.....	16
Marsodak, The, 94 F. 2d 339.....	29
Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 60 S. Ct. 517, 84 L. Ed. 774.....	27

	PAGE
McIntyre v. McIntyre, 4 Misc. 252, 30 N. Y. Supp. 200.....	23
McNeese v. McNeese, 190 Cal. 402, 213 Pac. 36.....	19, 29
Metropolitan Casualty Insurance Co. v. Smith and Smith, 58 F. 2d 699.....	15
Morgan, In re, 7 Paige (N. Y.) 236.....	19
Munro v. Smith, 259 Fed. 1, 170 C. C. A. 1, revg. 243 Fed. 654	29
Nashua Mfg. Co. v. Berenzweig, 39 F. 2d 896.....	29
Natal, The, 14 F. 2d 382.....	29
Orsini v. Metropolitan Life Ins. Co., 9 N. J. Misc. 407, 154 Atl. 201	20
Pignatelli v. Pignatelli, 169 Misc. 534, 8 N. Y. S. 2d 10.....	23
Pomeroy v. Collins, 198 Cal. 46, 243 Pac. 657.....	18
Record v. Ellis, 97 Kan. 754, 156 Pac. 712, L. R. A. 1916E 654, Ann. Cas. 1917C 822.....	29
Riggs v. American Tract Soc., 95 N. Y. 503.....	19
Smith v. Dental Products Co., 168 F. 2d 516.....	26
Trust Co. of America v. Nash, 50 Misc. 295, 98 N. Y. Supp. 734	22
Union Pac. Ry. Co. v. Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003.....	18
Van Orden v. Van Orden, 8 Hun. (N. Y.) 315.....	22
William Simpson Co. v. Ind. Acc. Comm., 74 Cal. App. 239, 240 Pac. 58.....	15, 17
Wilson v. Cross & Co., 33 Cal. 60.....	29
Wirz v. Wirz, 96 A. C. A. 172, 214 P. 2d 839.....	15, 17

STATUTES

Civil Code, Sec. 38.....	18, 19
Civil Code, Sec. 39.....	18, 19
Federal Rules of Civil Procedure, Rule 52.....	9, 27
Federal Rules of Civil Procedure, Rule 52a.....	13, 24

iv.

	PAGE
New York General Construction Law, Art. 2, Sec. 38.....	19
New York Real Property Law, Sec. 11.....	19
United States Code Annotated, Title 28, Sec. 1291.....	1
United States Code Annotated, Title 28, Sec. 1332.....	1

TEXTBOOKS

17 American Jurisprudence, Sec. 724, p. 544.....	23
26 American Jurisprudence, p. 878.....	21
5 Corpus Juris Secundum, Sec. 1660, p. 751, footnotes 86 and 87	29
1 Federal Rules Decisions, pp. 25, 30, 31, Nordbye, Improvements in Statement of Findings of Fact and Conclusions of Law	25
8 Federal Rules Decisions, p. 271, Yankwich, Findings in the Light of Recent Amendments.....	26
8 Federal Rules Decisions, p. 285, footnote 10.....	26

No. 12555
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LEONARD WOYNICZ, also known as Leonard Woynicz
Sianozecki,

Appellant,

vs.

ALEXANDRA WOYNICZ, also known as Alexandra Woynicz
Sianozecki,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

THE PLEADINGS:

The Amended and Supplemental Complaint [Tr. 20, 23-24, 3] alleges plaintiff to be a citizen of New York, defendant to be a citizen of California, founds cause of action on a written contract payable in installments, amount of demand: \$6,180, exclusive of interest.

The Answer admits defendant is not a resident of New York, avers defendant is a resident of Florida.

Findings of Fact and Conclusions of Law [Tr. 33-35] finds every allegation contained in the Complaint to be true.

It is believed that 28 U. S. C. A., Section 1332, and 28 U. S. C. A., Section 1291, sustain the jurisdiction of the District Court and the appellate jurisdiction of this Court.

Statement of the Case.

SUMMARY:

Plaintiff's Amended and Supplemental Complaint, hereinafter referred to as the "Complaint," alleged that on September 22, 1942, she and defendant, as husband and wife, entered into a written contract providing for payment to the wife of weekly installments of \$50, that the agreement, which is incorporated by reference [Tr. 3-10], provided for registered mail notice of default; that defendant prior to April 1, 1947, notified plaintiff in writing that he was "repudiating" the agreement and that because of this plaintiff sent no notices of default and that such notices were waived; that defendant owes \$6180 for back installments and praying for judgment.

Defendant's Answer [Tr. pp. 11-17] denied all the allegations of the Complaint, except plaintiff's place of residence, suggested failure of the Complaint to state a cause of action, said the agreement was void as contrary to public policy and had been wrongfully procured while defendant was mentally ill and that defendant did not understand the agreement when executed.

On behalf of the plaintiff, the defendant was examined and five depositions introduced—plaintiff's to the sole effect she had not married since the agreement was executed, and those of her attorney, the attorney who had represented the husband, that attorney's associate, and the deposition of defendant. All evidence for plaintiff was by depositions, all brought up in the record here.

On behalf of the defendant, the defendant, his adult daughter and adult nephew testified in court, and also a psychiatrist. The psychiatrist who had twice examined

defendant, gave his opinion that defendant had been mentally incompetent when the agreement was executed and had remained incompetent until 1947 when he began to improve—with the further opinion that defendant had not recovered. No expert evidence on the question of competency was introduced by plaintiff. Neither was any testimony as to defendant's competency given, on behalf of plaintiff, by anyone who had known defendant intimately. Plaintiff, by deposition, did not testify on the point.

The findings adopted by the court [Tr. 33-34] consist of a statement that each and every allegation of plaintiff's complaint is true, that defendant understood the agreement, and was mentally competent, that no fraud was practiced, and that he made weekly payments under the agreement for four years with knowledge of the agreement and nature of the payments. The Conclusions of Law [Tr. 34, 35] say that plaintiff is entitled to judgment for \$6180 and interest, and that the defenses set forth in the answer are without merit. The Complaint and Findings are silent as to whether the husband and wife were living together at the time the agreement was made. The findings and conclusions are silent as to whether the notice of default was waived.

Defendant made motion to amend findings and make findings more certain and objected to findings [Tr. 28-31], and moved for new trial [Tr. 25-27]. Both motions were denied [Tr. 31-32]. Judgment entered for plaintiff [Tr. 36-37]. Defendant appealed, from the judgment and from the orders denying the motions [Tr. 38].

DETAILED STATEMENT OF CASE:

Called as witness for plaintiff, the defendant husband testified [Tr. 42 to 58] that he married the plaintiff in 1916, that in July or August of 1942 the wife filed action against him for a separation, that thereafter there were negotiations for a settlement, he identified the separation agreement as bearing his signature and it was received in evidence, Plaintiff's Exhibit No. 1 [Tr. 44-53]. He further testified that thereafter the action was dropped by his wife and that he went to Florida in the early part of 1947, that he paid \$50 per week under the agreement until May 1947, and thereafter he paid \$50 per month. He identified a letter, Plaintiff's Exhibit No. 2 [Tr. 55-57], and testified that it had been sent with his consent to the plaintiff from the lawyers representing him in Florida. He admitted that the schedule of payments in Exhibit B to the Complaint [Tr. 23] was correct. The deposition of plaintiff was received in evidence [Tr. 61-62]. She testified she had never remarried since the execution of the separation agreement. Plaintiff rested.

In opening statement, defendant's counsel mentioned the difference between void and voidable contracts where incompetents were involved and that separation agreements must be fair and between competent parties [Tr. 63]. Testifying on his own behalf [Tr. 63 to 106] defendant said he was born in Poland in 1885, came to this country in 1911, did not speak English then, brought his wife here in 1916 from Russia, that he was nine years older than she; that in 1941 he learned of the death of a brother in Poland who had died in a horrible way, that "when the case came to court where my wife sue me for separation, it was such injustice. It was everything was false—" [Tr. 66].

“Mr. Weber: Just a minute, just a minute.

The Witness: All accusations was false.

Mr. Weber: Just a moment, Mr. Woynicz. I believe the question was something in connection with the news of your brother's death in 1941.

The Witness: That comes altogether. That is my wife—”

He testified the news of his brother's being killed in Siberia made him depressed, that defendant's son went into the service in 1940, that in June, 1941, defendant had an operation for appendicitis, complicated by peritonitis, and after the incision opened he had to wear the plate because his intestines would come out. In March, 1942, he had an operation to repair the hernia, and then his gall bladder was removed, that he worked for New York Thread Grinding Corporation, and because his intestines used to come out, the doctor forbid him to ride the subway, so he moved to walking distance of the shop; that he was served with papers in August, 1942, and because “all the accusations was false I thought I would drop dead. I was working 16 hours a day, and they accused me that I was talking with the women.” [Tr. 68.] He couldn't sleep at that time, and was concerned about his son who was in the service, he would cry, had trouble with muscular trembling, couldn't hold anything in the stomach. He would lose his way to the shop although he was familiar with his way there. People would talk to him and he couldn't understand what they were talking about. He would burn himself because he would forget you couldn't put water in liquid fire. He talked to God that he be killed. He thought he was insane because he could not understand what was going on. He took the papers to a lawyer named Zimmerman, who had been

recommended by his partner. He kept talking about the Moscow trials to his lawyer. He had pains in the head, stomach and the headache. He did not understand the agreement, but understood part of it. When he first got the papers he called the wife's attorney, Klaw, and asked him if it was a joke. He was under doctor's care at this time. The doctor gave him pills to make him sleep. He thought about his father who had committed suicide. He had trouble understanding what Mr. Zimmerman said to him. Many times he had lapses of memory. He was ashamed. He was shivering all the time. He was continually under doctor's care from 1942 until 1947 when he went to Florida. He got upset when his wife wouldn't go with him to see their son who was about to be shipped overseas. About September, 1942, he hoped a train would kill him, and he considered dynamite—"And so I considered if I would have peace if I committed suicide that way, and it would be no trouble to bury me no more. I would be disintegrated entirely." [Tr. 83.] In response to a question by the court, he said he served four and a half years in the Turkish Army, Central Asia.

On cross-examination, the witness testified in some detail concerning the circumstances surrounding the actual execution of the agreement.

Attorney for defendant suggested that the letter from the Florida attorneys [Tr. 55 to 57] had amounted to a disaffirmance of the agreement after a restoration to capacity [Tr. 78].

Edmund George Tanner [Tr. 106-114], testifying for the defendant, said defendant was his uncle, he associated with him from 1940 to 1943, when Tanner worked for him at New York Thread Grinding Corporation, where

defendant was president. He had frequent contact with defendant. As a subcontractor, he had to get heat treating done by defendant. About August, 1942, he gave parts to defendant to be heat treated, but defendant forgot about them. This happened on several occasions. Once he went off to look for something for the witness, and forgot that he had left witness waiting. Defendant had a habit of being hard of hearing, had many lapses of memory, would not answer, would fail to recognize his nephew at times, would engage in political discussions against the Russian regime, would complain of being very tired.

Wanda Woynicz Kuhrke testified for defendant [Tr. 115-137] at some length. She is his daughter. His health was bad and he was upset over domestic troubles. Defendant told her the pressure of the whole situation was so severe that he felt he was going out of his mind. That he just didn't know which way to turn. He couldn't sleep. He frequently cried. He told her his father had committed suicide, and he thought that would probably help him out of his troubles. He seemed worn out. He became very nervous and his hands shook. He had a peculiar nerve reaction in his cheek which would twitch rather violently at times. He told the witness that he felt that since so many people were killed in accidents every day, that he should be one of them. He talked to her about going to see Zimmerman, the attorney. He mentioned the Moscow trials. He told witness that he would like to jump in front of a train and kill himself. He mentioned blowing himself up, or killing himself in some way. He said God probably was not just to him. In the opinion of the witness, the defendant was mentally incompetent in August and September, 1942, and she

was intimately acquainted with him at the time [Tr. 129-130]. On cross-examination she testified that she didn't think he has fully recovered.

Dr. Walter Z. Baro, testifying for plaintiff, stated his qualifications as a specialist in mental and nervous diseases. He examined defendant in May, 1949, and again in March, 1950. He took a history to which he testified in detail [Tr. 139, 140, 141, 143]. When the doctor examined the defendant in March, 1950, he started to cry during the examination and said, "I wish God would kill me. My father committed suicide. I don't think he did the wrong thing." [Tr. 143.] In response to a hypothetical question as to the defendant's mental condition during the month of September, 1942, Dr. Baro replied:

"My opinion is that the man, due to external influences, developed severe nervousness, and finally developed what we call in mental and nervous diseases a reactive depression. That means a depression and reacting due to facts which have influenced him in that particular time. And a reactive depressive patient is a patient who very frequently will commit suicide. He not only talks about it, but has lost at that particular time the facts of reality. These patients do not live in reality. And in my opinion, that was his mental condition at the time in 1942." [Tr. 145.]

In regard to his mental condition between 1942 and 1947, the doctor stated that he probably slightly improved during that time, but that he did not think defendant recovered.

On cross-examination the doctor testified that he didn't think that the defendant in September, 1942, had the mental capacity to read a newspaper and understand it.

But that a mental patient of this kind could continue routine duties, something that he has been doing for years, automatic. That in his opinion the alimony suit of the wife produced mental illness. That the doctor did not believe that the defendant understood the ultimate result and ultimate effects of the separation action. That his hatred against his wife tended to show the patient's incompetency. The doctor believed that the patient knew he was signing something, but that he did not know the ultimate results.

All the depositions were introduced in evidence and later read into the record on the motion for new trial [Tr. 223-326].

On argument counsel for defendant again suggested that the agreement had been rescinded, and that an incompetent could not be estopped by his own acts [Tr. 171]. That the agreement was contrary to public policy [Tr. 172]. That separation agreements must be fair [Tr. 172]. That the uncontradicted testimony of the expert ought not be disregarded [Tr. 172].

The court said there was no question under the evidence that the cause of action alleged in the complaint was established.

On defendant's motion to amend findings, and to make findings more certain, and objections to findings [Tr. 28, 29, 30, 31], and on the motion for new trial [Tr. 25], counsel suggested that the proposed findings did not comply with Rule 52, Federal Rules of Civil Procedure: ". . . the court shall find the facts specially and state separately its conclusions of law thereon. . . ." [Tr. 178.] Further objection was taken of the failure of the court to construe the agreement [Tr. 178]. That it had

to be done because of the public policy questions involved [Tr. 178, 179 and 183, 184, 185, 186, 187]. That in incapacity cases, there are two kinds—a person without understanding, and a person not entirely without understanding but of unsound mind [Tr. 189]. That the uncontradicted expert testimony of a psychiatrist ought not to be ignored [Tr. 189]. That the mention of payments in the findings was out of place unless the court was holding that there was an estoppel of the incompetent [Tr. 192]. That there was a rescission between the parties [Tr. 193]. That the evidence presented by defendant had reached a point where the burden was cast on plaintiff [Tr. 193], because defendant had made a *prima facie* showing of unsound mind [Tr. 194; and also 195, 196]. That the court should have stated in findings what was the effect of the Florida letter—did it excuse the admitted failure of the plaintiff to serve registered notice of default, or was it a rescission [Tr. 195]? Point was also made that the findings did not find all the facts necessary to a valid separation agreement between husband and wife [Tr. 195]. Counsel for the plaintiff then explained the findings at some length [Tr. 196-201]:

“The Court: After reconsidering the proposed findings of fact and conclusions of law and judgment, the court has reached the conclusion that they refer to certain paragraphs in the complaint which contain allegations of fact involving the determination that the court made in deciding the case very clearly and explicitly, and counsel for the plaintiff this morning has very clearly and logically explained the contents

of these proposed findings and coupled them with the allegations of the complaint which are allegations of fact involved on the questions raised.

“The court adopts the views expressed here by counsel for the plaintiff, that this is a specific and fair proposed findings of fact and conclusions of law, and for that reason the objections to the proposed findings of fact and conclusions of law will be denied. . . .” [Tr. 201, 202.]

On the motion for new trial, counsel raised the insufficiency of evidence to justify the decision [Tr. 207]. Mentioned again the importance of expert testimony when uncontradicted [Tr. 207, 212]. Discussed the depositions [Tr. 208-209]. The distinction between totally without understanding and unsound mind [Tr. 210]. The question of rescission [Tr. 212]. The burden of proof [Tr. 212]. The public policy questions [Tr. 212, 214, 215, 217, 218, 219, 220]. That the court had erred in interpreting the agreement [Tr. 213, 214]. The failure of the complaint to allege that the parties were separated when the agreement was made, or that they separated afterward [Tr. 218].

The court then granted leave for counsel to read the depositions into evidence [Tr. 221]. After the reading of the depositions, counsel discussed the contents [Tr. 328]. Pointed out to the court that transactions between husband and wife have to be scrutinized more closely than arm's length agreements [Tr. 330]. Motion for new trial denied.

Specification of Errors.

IN REGARD TO THE INCOMPETENCE OF DEFENDANT:

1. The finding of the court that the defendant was competent, in the face of the uncontradicted testimony of the psychiatrist that the defendant was mentally ill, was an abuse of judicial discretion [Tr. 172, 26, 189, 193, 194, 335].
2. It is believed that the ruling of the court on the question of incompetency was based on a misconception of the law, the misconception being that only a person totally without understanding is entitled to protection on that ground, while a person of unsound mind is not [Tr. 63, 189, 194, 195, 210, 336].
3. That the trial court failed to recognize that upon a *prima facie* showing that defendant was of unsound mind, then the burden of proof shifted to the plaintiff [Tr. 193, 194, 212].
4. That the court failed to give adequate consideration to the common law and statutory presumptions regarding the invalidity of transactions between husband and wife, coupled with evidence that one of the parties was of unsound mind at the time of the transaction [Tr. 172, 173, 336].

IN REGARD TO DEFENDANT'S CONTENTIONS THAT THE AGREEMENT WAS CONTRARY TO PUBLIC POLICY:

5. Agreement contrary to public policy because paragraph Eighth thereof [Tr. 49], read together with other paragraphs, would seem to amount to a contracting away of the right to judicial redress, and hence to alter the incidents of the marriage [Tr. 11, 15, 63, 172, 178, 179, 183, 184, 335].

6. Agreement contrary to public policy because it can be construed as offering a bonus to the wife if she will procure a divorce from her husband, rather than the separation sued for [Tr. 11, 15, 184, 185, 186, 187, 335].
7. Agreement contrary to public policy because paragraph Ninth thereof [Tr. 49, 50], read together with other paragraphs, attempts to put the agreement beyond the reach of any court, and hence infringes on the jurisdiction of the courts [Tr. 11, 15, 172, 178, 179, 183, 186, 187].
8. That the plaintiff failed to sustain the burden of proof which was his to show, in order to escape having his agreement declared to be against public policy:
 - (a) That the agreement was fair and reasonable at the time of its execution and
 - (b) That the parties were separated prior to the making of the agreement [Tr. 11, 15, 63, 33, 34, 35, 326, 330].

IN REGARD TO THE FINDINGS AND CONCLUSIONS:

9. That the findings and conclusions are objectionable in that they are too indefinite and do not comply with Rule 52a, F. R. C. P.; attempt to incorporate complaint, answer and exhibits, by reference, as well as oral statements of counsel for plaintiff, is fatal—court erred in denying motion to amend and make certain [Tr. 28, 29, 30, 178; and particularly 196-201, 336].

10. That the findings and conclusions are insufficient to support the judgment because:
 - (a) No finding or conclusion is made as to whether or not the agreement was fair and reasonable at the time of its execution [Tr. 195].
 - (b) No findings or conclusion is made as to the way the court construed the agreement [Tr. 178, 183, 184, 185, 186, 187].
 - (c) No finding is made as to whether the parties were separated at the time of making the agreement [Tr. 11, 218, 219].
 - (d) No conclusion is stated as to whether the agreement is contrary to public policy [Tr. 11, 15].
 - (e) The findings are ambiguous and inconclusive as to the effect of making the payments over the four-year period [Tr. 192, 193, 41].
11. That the findings and conclusions are inadequate in that notwithstanding the requirement of paragraph Tenth of the agreement for registered mail notice of default, no finding or conclusion is made as to whether the letter from the defendant's Florida attorneys served to excuse and waive the requirement of registered mail notice of default, admittedly not given defendant, or whether the letter amounted to a rescission [Tr. 8, 55, 195, 336].
12. That the evidence is insufficient to support either the findings or the judgment [Tr. 336].

Arguments—Incompetence of Defendant.

ARGUMENT AS TO SPECIFICATION NO. 1:

“The finding of the court that the defendant was competent in the face of the uncontradicted testimony of the psychiatrist that the defendant was mentally ill, was an abuse of judicial discretion [Tr. 172, 26, 189, 193, 194, 335].”

EFFECT OF UNCONTRADICTED EXPERT MEDICAL EVIDENCE:

On the question of weight of evidence, burden of proof, and presumptions, the decisions of the state where the trial is had are controlling. (*Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; *Metropolitan Casualty Insurance Co. v. Smith and Smith* (C. C. A. 9th, Wash.), 58 F. 2d 699.)

A discussion of the California rule on expert testimony is found in *William Simpson Co. v. Ind. Acc. Com.*, 74 Cal. App. 239, 240 Pac. 58. Medical testimony was involved. The court said at 74 Cal. App. 243:

“The rule . . . appears to be that whenever the subject under consideration is one within the knowledge of experts only, and it is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases, neither the court nor jury can disregard such evidence by experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses.”

In *Wirz v. Wirz* (1950), 96 A. C. A. 172, 214 P. 2d 839, there was a question of manic depressive insanity. The court stated that the rule that uncontradicted testimony of a witness, in no way impeached or discredited,

may not be arbitrarily disregarded applies also to medical expert opinion evidence, citing *Mantonya v. Bratlie*, 33 Cal. 2d 120, 127, 199 P. 2d 677, 681, and *Levey v. Minott*, 214 App. Div. 192, 211 N. Y. Supp. 883. In *Levey v. Minott*, op. cite., there was an action for breach of promise. Defense—insanity. Verdict for the plaintiff. Reversed. The court said, at 214 App. Div. 194:

“One of the medical experts called on behalf of defendant described his malady as ‘manic depressive insanity,’ the characteristics of which are that attacks recur at regular intervals lasting for several months, while at other times the patient is normal; and while the condition is accompanied by delusions, it also distorts and warps every mental process, and during the period of ‘manic depressive’ condition the patient is not able to realize the meaning and significance of words or acts, even when conscious of the words and the acts themselves. His insight is destroyed; he is easily led and his emotional equilibrium is unsettled. This manic depressive malady differs from other forms of insanity because in other forms acts not directly connected with the particular delusion may be rational and valid. That he suffers and has suffered from this malady, the evidence leaves no doubt . . . while the jury might not have believed Fourette, who testified that he was her paramour, they should not have disregarded this medical proof. Upon the proof of defendant’s insanity . . . the verdict is totally against the evidence. . . .”

In other words, where you have a medical condition that laymen do not know about, the uncontradicted testimony of a qualified doctor is binding on the court. That is, unless it appears that the doctor is not worthy of belief. In the case at bar, the question was: Was defendant of unsound mind? Dr. Baro testified that defendant was suffering from a mental disease which he termed a "reactive depression." Is mental disease within the common knowledge of laymen? Is the particular mental disease called a "reactive depression" within the common knowledge of laymen? Of all of the things that have defied the efforts of man to find out anything about them, the human mind stands at the top of the list. A psychiatrist with years of schooling and actual experience in psychopathic wards of hospitals will have learned something. We would probably require a mechanic with at least six weeks at a trade school to tell us anything about the workings of an automobile engine. And the law is just as wise when it requires, as the rulings in *William Simpson Co. v. Ind. Acc. Com.*, 74 Cal. App. 239, 240 Pac. 58; and *Wirz v. Wirz*, 96 A. C. A. 172, 214 P. 2d 839, do require, that we be told as to disease of the human mind by one who knows something about it.

If more than one expert is produced, and they disagree—that is something else again. Or if the expert produced is found by the court to be unworthy of belief, then the court can make a finding to that effect, and go ahead and decide the case, or, to be on the safe side, appoint an expert to testify on behalf of the court. As appears from the transcript, only one expert was produced,

Dr. Baro. On the face of the record, he seems worthy of belief. The trial court has not made any indication that he is not. Dr. Baro testified that the defendant was suffering from "reactive depression," a mental disease often causing suicide. Such a person is not of "sound mind"! No expert was produced to contradict Dr. Baro. Consequently, Dr. Baro's testimony is binding on the issue.

ARGUMENT AS TO SPECIFICATION NO. 2:

"It is believed that the ruling of the court on the question of incompetency was based on a misconception of the law, the misconception being that only a person totally without understanding is entitled to protection on that ground while a person of unsound mind is not. [Tr. 63, 189, 194, 195, 210, 336.]"

The test is, "Was the party mentally competent to deal with the subject before him with a full understanding of his rights?" (*Pomeroy v. Collins*, 198 Cal. 46, 243 Pac. 657; *Union Pac. Ry. Co. v. Harris*, 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003; *Carr v. Sacramento C. & P. Co.*, 35 Cal. App. 439, 170 Pac. 446.)

Dr. Baro said that the defendant was suffering from "reactive depression" and that "these patients do not live in reality." [Tr. 145.]

The distinction to which appellant is pointing is well expressed in California Civil Code, Sections 38 and 39:

"A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him

necessary for (1) his support, or (2) the support of his family.” (Cal. Civ. Code, Sec. 38.)

“A conveyance or other contract of person of unsound mind, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code.” (Cal. Civ. Code, Sec. 39.) (Note: Defendant contended on trial that Plaintiff’s Exhibit No. 2, Tr. 55, 56, 57, had amounted in law to a notice of rescission. [Tr. 193, 197.] And that since plaintiff had to plead the letter to make a case, defendant did not have to plead it. [Tr. 195.] (*McNecse v. McNeese*, 190 Cal. 402, 213 Pac. 36).)

New York Real Property Law, Section 11, provides:

“A person other than a minor, an idiot, or person of unsound mind, seized of or entitled to an estate or interest in real property, may transfer such estate or interest.”

New York General Construction Law, Section 38, Article 2, provides:

“The terms lunatic and lunacy include every kind of unsoundness of mind except idiocy.”

In other words, it is recognized in New York that one may be of unsound mind and still not be totally without understanding—and yet be entitled to protection. (*Riggs v. American Tract Soc.*, 95 N. Y. 503, 512; *Coakley v. Coakley*, 163 Misc. 867, 293 N. Y. Supp. 421; *In re Morgan*, 7 Paige (N. Y.) 236; *Aidkens v. Roberts*, 164 N. Y. Supp. 502.)

It is submitted that the trial court based its result on the admitted fact that the defendant had some understanding at the time of the ransactions, even though suffering from mental illness.

ARGUMENT AS TO SPECIFICATION No. 3:

“That the trial court failed to recognize that upon a *prima facie* showing that defendant was of unsound mind, then the burden of proof shifted to the plaintiff. [Tr. 193, 194, 212.]”

Upon the presence of Dr. Baro’s uncontradicted testimony, the burden shifted to the plaintiffs. (*Orsini v. Metropolitan Life Ins. Co.*, 9 N. J. Misc. 407, 154 Atl. 201; *Aikens v. Roberts*, 164 N. Y. Supp. 502; *Livingston v. Safe Dep. & Trust Co.*, 157 Md. 492, 146 Atl. 432.)

ARGUMENT AS TO SPECIFICATION No. 4:

“That the court failed to give adequate consideration to the common law and statutory presumptions regarding the invalidity of transactions between husband and wife, coupled with evidence that one of the parties was of unsound mind at the time of the transaction. [Tr. 172, 173, 336.]”

“Equity will, in general, relieve a husband from his contracts with, or conveyance or transfer to, his wife, obtained by her fraud, undue influence, overreaching of him, etc., by means of her confidential relation with him, especially when the circumstances are such that the husband is dependent on the wife and so aged and weak in mind and body that he may

easily be subjected to her undue influence, overreaching, etc.; and in such a situation, it has been held, a conveyance or transfer from him to her will not be sustained or enforced without affirmative proof that his act was intelligently done without undue influence.” (26 Am. Jur. 878.)

In other words, a man who is suffering from mental disease, a “reactive depression” [Tr. 145], working 16 hours a day [Tr. 68], physically worn out [Tr. 121], and in his late fifties [Tr. 64], should have some protection against a wife who is 9 years younger [Tr. 65]. The plaintiff wife did not testify as to his mental and physical condition at the time he signed the paper and in the months before that. Only the depositions of Zimmerman and Simon are offered. Admittedly these lawyers did not know the husband before August, 1942. Between then, and September 22, 1942, they only saw him briefly a few times. They never knew him when he wasn’t sick. Their depositions seem inadequate as affirmative proof that the agreement was entered into without advantage having been taken of the husband.

It seems to counsel that the absence of one word in the record from the wife as to the mental and physical condition of her husband during the months which led up to the agreement is an omission which should not be overlooked.

Arguments—Public Policy.

ARGUMENT AS TO SPECIFICATION NO. 5:

“Agreement contrary to public policy because paragraph Eighth thereof [Tr. 49], read together with other paragraphs would seem to amount to a contracting away of the right of judicial redress, and hence to alter the incidents of marriage [Tr. 11, 15; 63, 172, 178, 179, 183, 184, 335].”

Paragraph Eighth of the agreement [Tr. 49] says that “If the Husband defaults . . . the Wife shall have the right to bring an action either for legal separation or for support and maintenance or for both . . .” And may ask for alimony and attorney fees. Does this mean that so long as the husband is not in default, the wife may not bring such an action? If that is the intent of the agreement, it is contrary to public policy. (*Armstrong v. Armstrong*, 1 N. Y. S. R. 529; *Berg v. Berg*, 366 Ill. 228, 8 N. E. 2d 623; *Gatliff Coal Co. v. Cox*, 142 F. 2d 876; *Van Orden v. Van Orden*, 8 Hun. (N. Y.) 315.)

ARGUMENT AS TO SPECIFICATION NO. 6:

“Agreement contrary to public policy because it can be construed as offering a bonus to the wife if she will procure a divorce from her husband, rather than the separation sued for. [Tr. 11, 15, 184, 185, 186, 187, 335.]”

Even if the agreement did not intend to bar litigation, it is objectionable as a bonus agreement. (*Trust Co. of America v. Nash*, 50 Misc. 295, 98 N. Y. Supp. 734. See argument Tr. 184, 185, 186.)

Since the court could not modify it, according to its terms, and since there was no limitation on the total amount, it amounted to this: the wife was to have as a

bonus all of the benefits under the agreement, including the \$50 per week payments. This bonus was to be in addition to whatever the court might award her in a divorce action. Such an arrangement might well encourage divorce.

ARGUMENT AS TO SPECIFICATION No. 7:

“Agreement contrary to public policy because paragraph Ninth thereof [Tr. 49, 50] read together with other paragraphs attempts to put the agreement beyond the reach of any court and hence infringes upon the jurisdiction of the courts. [Tr. 11, 15, 172, 178, 179, 183, 186, 187.]”

The court can not be divested of its power to modify. (*Kraunz v. Kraunz*, 293 N. Y. 152, 56 N. E. 2d 90; *Pignatelli v. Pignatelli*, 169 Misc. 534, 8 N. Y. S. 2d 10.)

ARGUMENT AS TO SPECIFICATION No. 8:

“That the plaintiff failed to sustain the burden of proof which was his to show, in order to escape having his agreement declared to be against public policy: (a) That the agreement was fair and reasonable at the time of its execution, and (b) That the parties were separated prior to the making of the agreement [Tr. 11, 15, 63, 33, 34, 35, 330].

“A separation agreement must be untainted by fraud, must be in all respects fair, reasonable, and just in view of all the circumstances of the parties at the time, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties.” (17 Am. Jur., Divorce and Separation, Sec. 724, p. 544; *Beard v. Beard*, 65 Cal. 354; *McIntyre v. McIntyre*, 4 Misc. 252, 30 N. Y. Supp. 200; *Helvering v. Leonard*, 60 S. Ct. 780, 310 U. S. 80, 84 L. Ed. 1087.)

Arguments—Findings and Conclusions.

ARGUMENT AS TO SPECIFICATION No. 9:

“That the findings and conclusions are objectionable in that they are too indefinite and do not comply with Rule 52a F. R. C. P.; attempt to incorporate complaint, answer, and exhibits, by reference, as well as oral statements of counsel for plaintiff, is fatal—court erred in denying motion to amend and make certain. [Tr. 28, 29, 30, 178, but particularly 196-201, 336.]”

The findings [Tr. 33, 34, 35] say, “That each and every allegation contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX of plaintiff’s amended and supplemental complaint herein, is true.” Then they go on to say that the defendant was competent, and that no fraud was practiced upon him, and that he made payments under the agreement with knowledge of it, and what the payments were for.

It is submitted that the attempted incorporation of the complaint by reference into the findings is not a compliance with rule 52a, F. R. C. P., which provides, in part, “In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . .”

Judge Nordbye has this to say of such findings:

“Some judges have followed the practice of adopting certain portions of the complaint and answer, as the case may be, in drawing their findings, and proceed by stating, ‘I find Paragraphs 1, 2, 3, 4, etc. . . . of the complaint to be true,’ and then set forth their conclusions of law. Well, I doubt that this practice complies with Rule 52, and I question its wisdom. It is not a very judicial way of disposing

of a case. It smacks of a short-cut procedure, of undue haste, and the disposition of the controversy without due consideration. Then, again, the complaint or answer may contain evidentiary matters . . . I doubt that any one of us is so overburdened with work that he cannot spend the extra time which will dispose of the litigation in a good, workmanlike manner.” (Article, Improvements in Statement of Findings of Fact and Conclusions of Law, Hon. Gunnar H. Nordbye, 1 Fed. Rules Dec. 25, at pp. 30, 31.)

In *Brooks Bros. v. Brooks Clothing of Calif., Ltd.*, 5 Fed. Rules Dec. 14, the court said,

“An analysis of the Findings and Judgment by counsel will show readily what, if any changes I have introduced in each paragraph. In some instances I have eliminated verbiage which I thought was surplusage. Even as rewritten, the findings are longer than we have been accustomed to in the past. But, all findings, at the present time, are, of necessity such. For the Supreme Court in *Schneidermann v. United States*, 320 U. S. 118, 129, 63 S. Ct. 1333, 87 L. Ed. 1796, has ruled that findings of ultimate facts—as we were taught by the older authorities—are no longer sufficient.

“And, following the *Schneidermann* decision, the Ninth Circuit Court of Appeals sent back to me a similar case (*United States v. Bergmann*, 1942, 47 F. Supp. 765) in which I had made findings in the language of the allegations of the Complaint and negatived certain defenses in the language of the Answer—the orthodox way which, in California, we have followed for many, many years, both in state and federal practice.

“The order of the Circuit Court was that I made the findings conform to the ruling in the Schneidermann case. This I did, by, in effect, epitomizing all the evidence in the case. That this is what the court expected is evidenced by the fact that no question of their sufficiency as to form was raised afterwards. And the appeal was decided on the basis of the facts which I set forth.”

See also, Article, Findings in the Light of Recent Amendments, Hon. Leon R. Yankwich, 8 Fed. Rules Dec. 271, and particularly the quotation from the letter of the Librarian of the Ninth Circuit Court of Appeals which appears in footnote 10, 8 Fed. Rules. Dec. at 285. The findings at bar are too general. (*Knapp v. Imperial Oil & Gas Products Co.*, 130 F. 2d 1; *Smith v. Dental Products Co.*, 168 F. 2d 516.)

But there is more to the findings than the document itself [Tr. 33, 34, 35] and the Amended and Supplemental Complaint [Tr. 20, 21, 22, 23, 24] and Exhibit “A” to Original Complaint [Tr. 3, 4, 5, 6, 7, 8, 9, 10] and the Answer [Tr. 11, 12, 13, 14, 15, 16, 17]—all of which are attempted to be incorporated into the findings. Something else happened to further confuse the findings. Arguing against the Motion to Amend Findings and to Make Findings More Certain and Objections to Findings, counsel for the plaintiff “explained them” [Tr. 196, 197, 198, 199, 200, 201]. This would have probably been all right, but in ruling against the motion, the judge expressly adopted the explanation made by counsel for the plaintiff [Tr. 201, 202]. So now to find out just what the findings are, it is necessary not only to refer to the Complaint, its exhibit, and the Answer, but also the argument of counsel for the plaintiff, and the judge’s ruling on the motion.

Counsel for defendant does not wish to labor what might be called a technical objection, but it is felt that the trial court misunderstood the law to be applied to the case. Moreover, the findings in their present form make it difficult, if not impossible, to determine just what facts were found. The conclusions are so broad that it is hard to say just what the judge thought the law to be. It is felt that the purpose behind the mandatory requirement of findings in Rule 52, F. R. C. P., is to tie down the facts found, together with the law, in much the same way jury instructions and verdict are tied. This gives the court on appeal something to hang onto. It also gives the losing litigant a better idea of why he lost. In the long run, specific findings, separately stated, probably reduce the number of appeals. (*Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 60 S. Ct. 517, 84 L. Ed. 774; *Kelley v. Everglades Drainage District*, 319 U. S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485.)

ARGUMENT AS TO SPECIFICATION NO. 10:

“That the findings and conclusions are insufficient to support the judgment because: (a) no finding or conclusion is made as to whether or not the agreement was fair and reasonable at the time of its execution [Tr. 195], (b) no finding or conclusion is made as to the way the court construed the agreement [Tr. 178, 183, 184, 185, 186, 187], (c) no finding is made as to whether the parties were separated at the time of making the agreement [Tr. 11, 218, 219], (d) no conclusion is stated as to whether the agreement is contrary to public policy [Tr. 11, 15], (e) the findings are ambiguous and inconclusive as to the effect of making the payments over the 4 year period. [Tr. 192, 193, 41.]”

Considering (a), (b), (c) and (d) together, it is the view of defendant that findings should be made as to all the essential ingredients that go to make up a valid separation agreement in order to support a judgment. (*Lake v. Lake*, 136 App. Div. 47, 119 N. Y. Supp. 686.)

Considering (e), that defendant made the payments. This is set forth special. It is also alleged in the complaint. In light of the comments of the court at Tr. 176, counsel, in reading this finding, has always wondered if the court weren't saying in effect, "Your man was competent when he signed that agreement—but—well, if he weren't competent when he signed it—if he was of unsound mind, then because he made the payments for more than four years, he is estopped to deny the agreement." Counsel feels that neither the facts nor the law permit such a holding of estoppel. (*Anglo-California Bank v. Ames*, 27 Fed. 727.)

ARGUMENT AS TO SPECIFICATION No. 11:

"That the findings and conclusions are inadequate in that notwithstanding the requirement of paragraph Tenth of the Agreement for registered mail notice of default, no finding or conclusion is made as to whether the letter from the defendant's Florida attorneys served to excuse and waive the requirement of registered mail notice of default, admittedly not given defendant, or whether the letter amounted to a rescission. [Tr. 8, 55, 195, 336.]"

Paragraph IX of the Amended and Supplemental Complaint [Tr. 22] pleads the letter of repudiation [Plaintiff's Exhibit No. 2, Tr. 55-57]. It also pleads "the sending of such notice or notices was rendered unnecessary, useless and futile and was waived by the defendant." The allegation of waiver is a conclusion of law and should have been

so stated by the judge if he so found. Although the defendant contended that there had been a rescission as a result of the letter, the judge failed to find either way as to the matter. *McNeese v. McNeese*, 190 Cal. 403, 213 Pac. 36, seems to show a like example of a time when a trial judge took the view that, as a matter of law, a person of unsound mind only was not entitled to relief.

ARGUMENT AS TO SPECIFICATION NO. 12:

“That the evidence is insufficient to support either the findings or the judgment. [Tr. 336.]”

All of the testimony offered to prove the plaintiff's case is in deposition form. All the evidence introduced is contained in the record (*The Natal* (C. C. A. 9th), 14 F. 2d 382, certiorari denied; *Dampskibs Aktieselsk Orient v. W. R. Grace & Co.*, 273 U. S. 748, 47 S. Ct. 449, 71 L. Ed. 872); this court then is in a position to review the depositions and is not bound by the findings of the trial court (*Nashua Mfg. Co. v. Berenzweig* (C. C. A., Ill.), 39 F. 2d 896; *Munro v. Smith*, 259 Fed. 1, 170 C. C. A. 1, reversing 243 Fed. 654; *Record v. Ellis*, 97 Kan. 754, 156 Pac. 712, L. R. A. 1916E 654, Ann. Cas. 1917C 822); and the court may exercise independent consideration as to the credence to be given the depositions (*Linn v. Blanton*, 111 Kan. 743, 208 Pac. 616; cases collected 5 C. J. S., Appeal and Error, Sec. 1660, p. 751, footnotes 86 and 87; *The Marsodak*, 94 F. 2d 339; *Wilson v. Cross & Co.*, 33 Cal. 60).

Counsel respectfully suggests that upon reading the record and reviewing the evidence contained in the depositions—the depositions that are the only evidence offered by the plaintiff—this court will gain a feeling of the truth.

On the whole, the record contains simply the rather depressing story of a hardworking man of mature years. How a long illness came after news of the murder of his brother. Complications set in from his operations. Domestic troubles grew until the mind could stand no more. Worry and overwork sought a release. The mind turned to suicide. Not a sound mind. But an unsound mind. And that is the mind which executed the agreement. That is the agreement on which the judgment rests. Should such an agreement be upheld?

Respectfully submitted,

JERRY B. RISELEY,

Attorney for Appellant.

No. 12555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEONARD WOYNICZ, also known as Leonard Woynicz
Sianozecki,

Appellant,

vs.

ALEXANDRA WOYNICZ, also known as Alexandra Woynicz
Sianozecki,

Appellee.

APPELLEE'S BRIEF.

DANIEL A. WEBER,
208 South Beverly Drive, Beverly Hills,
Attorney for Appellee.

FILED

OCT 10 1950

PAUL P. O'BRIEN,

CLERK

TOPICAL INDEX

	PAGE
Statement of the case.....	1
Summary of argument.....	12
Argument	16
Point I. The separation agreement in suit, made in New York, was and is in all respects a valid and enforceable agreement under the laws of New York, agreements similar to the one in suit are uniformly held to be not violative of any principle of public policy and to be enforceable like other agreements	16
Point II. The record amply supports the trial court's finding that the defendant was in all respects competent to execute the agreement in suit.....	17
Point III. By reason of his conscious performance of the agreement for a period of four and one-half years, defendant is now precluded, as a matter of law, from avoiding it upon the ground of mental incompetence.....	19
Point IV. The defendant's repudiation of the entire agreement in March, 1947, and his notice to plaintiff that he would no longer perform or abide by its terms, made it unnecessary for plaintiff to give defendant notice to cure his defaults. Such a step was obviated and rendered useless and futile by defendant's announced repudiation of the agreement	21
Point V. The findings and conclusions properly embody the decision of the trial court. In any event, the appellant has suffered no prejudice whatever by reason of the form of the findings and conclusions.....	22
Conclusion	23

TABLE OF AUTHORITIES CITED

CASES	PAGE
Aldrich v. Bailey, 132 N. Y. 85.....	13, 17
Bernstein v. Bernstein, 80 Cal. App. 2d 921.....	13, 18
Burk v. Johnson, 146 Fed. 209.....	14, 20
Burnes v. Burnes, 137 Fed. 781; cert. den. 199 U. S. 605.....	14, 20
Calligan v. Haskell, 143 App. Div. 574, 128 N. Y. Supp. 293....	13
City of Reading v. Rae, 106 F. 2d 458; cert. den. 308 U. S. 607	14, 20
Cleland v. Peters, 70 Fed. Supp. 769.....	13
De Arellanes v. Arellanes, 151 Cal. 443.....	13, 19
Finesilver v. T. G. & T. Co., 258 App. Div. 946, 17 N. Y. S. 2d 868.....	20
First Nat. Bk. v. Seldomridge, 271 Fed. 561.....	20
Flagg v. Fink, 93 App. Div. 169, 87 N. Y. Supp. 530.....	14, 21
Goldberg v. Rempp, 95 Cal. App. 452.....	14, 21
Goldman v. Goldman, 282 N. Y. 296.....	12, 16
Haas v. Haas, 298 N. Y. 69.....	12
Haines v. Scott, 35 App. Div. 515, 54 N. Y. Supp. 844.....	13
Hill v. Hill, 23 Cal. 2d 82.....	12, 16
Holland v. Zollner, 102 Cal. 633.....	13, 19
Hough v. Hough, 26 Cal. 2d 605.....	12, 16
Klimkiewicz v. Westminster Deposit & Trust Co., 122 F. 2d 957; cert. den. 62 S. Ct. 663, 315 U. S. 805.....	15, 22
Lee v. State of New York, 187 Misc. 268, 64 N. Y. S. 2d 417	13
McCollum, Estate of, 59 Cal. App. 2d 744.....	13, 18
Monson v. Fischer, 118 Cal. App. 503.....	14, 21
Moritz v. Moritz, 153 App. Div. 147, 138 N. Y. Supp. 124.....	13
Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541.....	13
New York Tel. Co. v. Jamestown Tel. Corp., 282 N. Y. 365, 26 N. E. 2d 295.....	20

PAGE

Northern Pac. Ry. Co. v. United States, 70 Fed. Supp. 836.....	14, 20
People v. Manoogian, 141 Cal. 592.....	13, 19
Riggs v. American Tract Society, 95 N. Y. 503.....	13
Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82.....	15, 22
Shaw v. Republic Life Ins. Co., 69 N. Y. 286.....	14, 21
Skelly Oil Co. v. Holloway, 171 F. 2d 670.....	15, 22
Sneed v. Marysville Gas, etc., 149 Cal. 704.....	13, 19
Wirz v. Wirz, 96 A. C. A. 172.....	13, 18

STATUTES

Civil Code, Sec. 158	12, 16
Civil Code, Sec. 159	12, 16
Civil Code, Sec. 1440.....	14, 21
Civil Code, Sec. 1588.....	20
Federal Rules of Civil Procedure, Rule 52.....	15, 22

TEXTBOOKS

1 California Jurisprudence, pp. 343-344.....	14, 21
6 California Jurisprudence, pp. 93-94	20
17 Corpus Juris Secundum, pp. 927-928.....	20

No. 12555
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LEONARD WOYNICZ, also known as Leonard Woynicz
Sianozecki,

Appellant,

vs.

ALEXANDRA WOYNICZ, also known as Alexandra Woynicz
Sianozecki,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

The appellant's "Detailed Statement of the Case" [Tr. 4-11] is so incomplete, fragmentary and one-sided that we find it necessary to supplement the same with the following:

The defendant came to this country in 1911 [Tr. 320] and was married to plaintiff in 1916 [Tr. 43]. They resided in New York City. Prior to August, 1942, the parties separated [Tr. 118]. In August, 1942, plaintiff filed an action in the Supreme Court of the State of New York, County of New York, for a legal separation. In connection therewith she served motion papers upon the defendant for an award of temporary alimony and counsel fees for the prosecution of said action [Tr. 85].

The defendant, after an ineffectual attempt to work out a settlement with plaintiff's attorney (in the New York action), retained the New York law firm of Zimmerman and Simon. In charge of the matter was J. Charles Zimmerman, who then had been practicing about 23 years and who was then a judge of the City Court of the City of Long Beach, New York [Tr. 223].

At that time the defendant was president and general manager of the New York Thread Grinding Corporation and had occupied those positions since 1940 [Tr. 84]. He continued in those positions until the dissolution of the corporation in December, 1946 [Tr. 84]. At least 150 people were employed by said corporation which the defendant headed [Tr. 84]. He regularly signed checks as an officer of the corporation [Tr. 84], and executed contracts on behalf of the corporation, especially the "important ones" [Tr. 84]. He devoted full time to his business daily and was on hand supervising the corporation's daily activities [Tr. 84, 85]. In addition thereto he engaged in production conferences [Tr. 85] and took charge of purchasing supplies and materials [Tr. 107]. The defendant admitted on cross-examination that when the matrimonial papers were served upon the defendant he knew from his reading thereof that his wife was suing him for separation; that she was demanding temporary alimony and counsel fees [Tr. 85].

Many conferences were thereafter held between the defendant and Mr. Zimmerman, several of which were attended by Mr. Simon, Mr. Zimmerman's partner [Tr. 251, 253-5]. During August and September, 1942, negotiations were conducted between Mr. Zimmerman and Mr. Klaw, attorney for the plaintiff in the New York action, looking to an amicable settlement of the separation action

and alimony and counsel fees incident thereto [Tr. 226-7, 229-230]. In the course of these negotiations offers and counter-offers [Tr. 230] passed back and forth, all of which culminated in the reaching of an agreement between Mr. Zimmerman and Mr. Klaw for the payment of \$50.00 a week support and maintenance, the payment of \$350.00 as counsel fees, the conveyance of a life interest in the dwelling then occupied by plaintiff (a two-family house at 2929 Wellman Avenue, Bronx, New York City), and for the discontinuance of the separation action [Tr. 230, 255]. A written separation agreement embodying the terms agreed upon was to be prepared and pursuant thereto each side prepared a draft of the agreement. The defendant admitted on cross-examination that before the final agreement was signed by the defendant he consulted and conferred several times with his attorneys and in the course of these meetings suggested changes, amendments and additions, including provisions relating to the duration of payments to be made by him for support and maintenance, visitation rights in respect to their son Robert, and right of removal of certain personal property belonging to defendant or Robert [Tr. 47, 86, 88, 89, 90, 91].

An agreement in final form was ultimately prepared and signed by both parties [Pltf. Ex. 1, Tr. 44-53]. The defendant executed the agreement in the presence of Mr. Zimmerman and Mr. Simon, his attorneys, and acknowledged his signature before Mr. Simon as notary public [Tr. 10]. At the time he signed the final agreement, which is the basis of this action, Mr. Zimmerman, in the presence of Mr. Simon, went over the agreement with the defendant paragraph by paragraph, during which process defendant indicated by his words and actions that he under-

stood the points under discussion [Tr. 230, 231, 233, 234, 256, 265].

The defendant further admitted on cross-examination that Mr. Zimmerman told him what the New York suit was about, *i. e.*, that the action was one for separation, that his wife was seeking alimony and counsel fees [Tr. 86, 288], and that they discussed "a number of subjects" involved in his wife's suit for separation [Tr. 86]. It was on the defendant's request that a provision in the final draft of the separation agreement giving the wife certain visitation privileges was stricken out [Tr. 89]. At the time he executed the agreement he affixed his initials to such deletion, and in so doing knew at the time he was thus signifying his approval of the change [Tr. 96].

The defendant also admitted that he told Mr. Zimmerman that he did not want the alimony payments to go on forever and objected to the provision in respect thereto embodied in the first draft of the separation agreement [Tr. 90]. He also discussed with his attorney the termination of support payments in the event of his death and requested that a provision to that effect be incorporated in the separation agreement [Tr. 90]. He also admitted discussing with his attorney the subject of terminating payments of support in the event of the wife's remarriage and the subject of counsel fees, to wit, the payment of \$350.00 to Mr. Klaw [Tr. 91]. Defendant also admitted discussing with his attorney the effect of the agreement in the event "times went bad" [Tr. 95], and also the conveyance of a life interest to the wife in said real property [Tr. 95, 96].

In his deposition the defendant admitted that he read in part the matrimonial papers that were served upon him and knew and understood from his reading that his wife

wanted a separation; that she was suing therefor and that she was seeking temporary alimony and support [Tr. 289].

The agreement was ultimately signed and the separation action was withdrawn [Tr. 49, 54]. The defendant knew when he signed the separation agreement that as a result thereof his wife's action for separation was to be dropped [Tr. 295].

Contemporaneously with the signing of said agreement the defendant executed three other documents, to wit, a check in the sum of \$350.00 [Pltf. Ex. 6, Tr. 92] payable to Mr. Klaw as and for his counsel fees under the separation agreement, a check in the sum of \$150.00 [Pltf. Ex. 7, Tr. 93], representing three accrued weekly installments of support pursuant to the separation agreement, and a conveyance of a life estate to the wife in said real property [Tr. 93]. The defendant admitted that in executing these documents he knew at the time what they were for [Tr. 93]; that he was required to pay counsel fees in the amount of \$350.00 to Mr. Klaw, and that the separation agreement so required; that three weekly installments of support money were then to be paid, and that the check in the amount of \$150.00 constituted payment thereof under the agreement [Tr. 91, 92, 93].

The defendant thereafter continued uninterruptedly to attend to his daily business at New York Thread Grinding Corporation until December, 1946 [Tr. 84]. During the entire interval from September, 1942, to March, 1947, he continued to write checks in payment of the weekly installments accruing under the separation agreement [Pltf. Ex. 10, Tr. 94; 304]. Asked specifically about individual checks the defendant admitted that at the time he executed the checks he knew what they were for and that they

were executed pursuant to the separation agreement [Tr. 93, 94].

In January, 1947, the defendant went to Florida and on March 3, 1947, his Florida attorneys sent plaintiff a letter repudiating the separation agreement [Pltf. Ex. 55, Tr. 55-57]. (It is noteworthy that no claim was advanced in said letter that the defendant was incompetent at the time he signed the agreement or at any other time.)

The defendant's daughter, Mrs. Kuhrke, called by defendant as a witness, corroborated the defendant's admission in the separation agreement [Tr. 44] that he and his wife were living apart at the time of the separation agreement [Tr. 118]. She testified that she attended a meeting at Mr. Zimmerman's office at defendant's request, first alone and then in the presence of the defendant [Tr. 123, 126, 132-133]; that the defendant went to his business every day [Tr. 131]; that he continued to discharge his duties as president [Tr. 131, 135]; and that she saw defendant sign many of the checks for support which were introduced in evidence [Tr. 134]. She testified that the defendant knew when he executed the checks [Pltf. Ex. 10, Tr. 94] in payment of support pursuant to the separation agreement were so required by its terms [Tr. 136].

The deposition of Mr. Zimmerman shows that when retained by the defendant he was a practicing attorney for approximately 23 years and a judge in the City Court of Long Beach, New York [Tr. 223]. He was retained by Mr. Woynicz in August, 1942 [Tr. 225-226].

His deposition gave some of the background of the agreement, *i. e.*, that Mrs. Woynicz was seeking temporary alimony in the sum of \$100 per week and counsel fees in the amount of \$1,000, and in support of her said claims

asserted that the defendant's means were in excess of \$100,000 and his annual income in excess of \$15,000 [Tr. 225].

He discussed with Mr. Woynicz the charges asserted in the separation action [Tr. 228] and was asked by the defendant to try to work out a settlement [Tr. 236].

Protracted negotiations looking to an amicable settlement were undertaken [Tr. 226-7, 229-30]. The defendant authorized Mr. Zimmerman to submit a counter-proposition for the payment of \$50 a week for support, which was the amount ultimately accepted [Tr. 230]. Many meetings with Mr. Woynicz thereafter took place—upwards of a dozen [Tr. 237, 226-227, 229-230]—in the course of which the contractual obligations were explained by him to the defendant [Tr. 230] and the defendant gave every indication that he comprehended what was being discussed [Tr. 231].

Mr. Zimmerman further testified that the defendant further suggested changes and additions to the draft as he read the proposed draft of the agreement [Tr. 231-232, 239]. The final draft was explained to him paragraph by paragraph and the defendant even objected to one clause and suggested it be stricken out of the final draft [Tr. 234].

The defendant read the conveyance of the life estate called for by the separation agreement and also the checks for counsel fees and accrued installments hereinabove mentioned [Tr. 234-5]. He denied that the subject of Moscow or Moscow trials was ever mentioned or that any imposition, coercion or irregularity was practiced [Tr. 235, 236, 237, 238, 244-249].

At all times Mr. Woynicz spoke English and gave every indication that he understood English [Tr. 237, 239, 245]; that Mr. Woynicz wrote him letters in English [Tr. 237], and that Mr. Woynicz at all times "was rational" [Tr. 240].

The deposition of Mr. Simon substantially corroborates the deposition of Mr. Zimmerman. He testified that he was present at several meetings with Mr. Zimmerman and Mr. Woynicz [Tr. 251]; that Mr. Woynicz signed the final agreement in his presence and that he notarized it [Tr. 252]. That prior to the signing of the final agreement there were discussions with Mr. Woynicz concerning the amount of alimony or support, the disposition of real property, the custody of Robert [Tr. 253-255]; that the sum of \$50 a week for support, incorporated in the final agreement, was arrived at after considerable discussion and bargaining [Tr. 255]; that prior to the signing Mr. Zimmerman read each paragraph of the final agreement to Mr. Woynicz [Tr. 256, 265]; and that they all conversed in the English language, which Mr. Woynicz gave every indication of understanding [Tr. 255, 256]; and that the defendant at all times was "rational" [Tr. 256]. The practice of any irregularity or imposition upon the defendant was denied [Tr. 257-266].

The deposition of Mr. Klaw, attorney for plaintiff in the New York separation action, shows that Mr. Woynicz first telephoned personally to Mr. Klaw and offered \$20 a week [Tr. 268]; that he spoke to Mr. Klaw in understandable English [Tr. 268]; that many discussions and protracted negotiations ensued between Mr. Klaw and Mr. Zimmerman [Tr. 270-271], and that at the time of the signing of the separation agreement he received a check in the sum of \$350 as counsel fees and \$150 for

payments accruing under the separation agreement [Tr. 270-273]. The existence of any irregularity or imposition upon the defendant was denied [Tr. 275 *et seq.*].

Dr. Baro, called as an expert witness by the defendant, testified that he first saw the defendant on May 11, 1949 (which was after the filing of this action), and that the only other time he saw the defendant was on March 3, 1950, a few days before he testified as a witness upon the trial [Tr. 139]. Asked by defendant's counsel to give his opinion concerning the defendant's "mental condition during the month of September, 1942," he testified that the defendant was suffering a "reactive depression" [Tr. 145]. This was followed by a question to which objection was made wherein he was asked to "*assume* that the man's condition *remained the same* between September, 1942, and the latter part of 1947," and to state his "opinion as to [the defendant's] mental condition between September, 1942, and the latter part of 1947" [Tr. 145-146]. His answer was that the defendant was "probably slightly improved during that time, but I do not think that he recovered" [Tr. 146]. On cross-examination Dr. Baro testified that the fact that the defendant continued the regular discharge of his duties in charge of the purchasing of materials for the New York Thread Grinding Corporation "has no relevance whatsoever" and no bearing at all on the formulation of his opinion concerning the defendant's mental condition [Tr. 148-149]; that the fact that the defendant regularly signed checks in connection with his business "would not have any bearing" on his opinion concerning the mental capacity of the defendant to execute the agreement in suit [Tr. 149]; that it would make no difference in his opinion that the defendant "issued and knew the purpose of checks in the regular discharge of his duties" [Tr. 149]; or that

the defendant “comprehended the purpose or reason for a check or a particular series of checks” [Tr. 149]. He testified further on cross-examination that the defendant did have the competence to understand that he was being sued for separation [Tr. 150]; that he *was* competent to understand that his wife was asking for temporary alimony in the separation action which she instituted against him [Tr. 150]; that the fact that the defendant understood he was being sued for temporary alimony by his wife “produced, in [his] opinion mental illness” [Tr. 150-151]; that he did not think that the defendant understood at that time that his wife was asking for counsel fees [Tr. 151] (which is at variance with the defendant’s own admission that he did know that fact [Tr. 85]); that the nature and extent of the conferences and negotiations that took place between Mr. Woynicz and his attorney, Mr. Zimmerman, and the “subjects discussed” between them—in fact “no matter what they discussed”—would have any bearing on the formulation of his opinion concerning the defendant’s mental capacity to execute the agreement in suit [Tr. 152]. He testified further that “even though Mr. Woynicz knew perfectly well that he was signing a separation agreement,” in the opinion of the witness the defendant “did not have the competency to execute that separation agreement,” and this even though the defendant “discussed each of the clauses with Mr. Zimmerman” [Tr. 152].

He testified it was immaterial that the defendant “insisted on certain changes being made” in the agreement, or that “at the time [the defendant] comprehended what was told to him”; and that the defendant’s insistence a provision respecting visitation privileges be stricken out, “would have a bearing to increase [his] belief of incom-

petency, because the man had such a hatred at that particular time towards his wife" [Tr. 152-153].

He testified further on cross-examination that the defendant "certainly" knew that "the separation agreement involved matters of custody"; that "it involved matters of alimony"; that it "involved matters of removing from the premises at 2929 Wellman Avenue"; and that "it also involved matters of removing tools from the house" [Tr. 155]. He testified further on cross-examination that the defendant "probably knew that he had to sign this check" for \$350.00 in payment of Mr. Klaw's counsel fees, and knew that it was for counsel fees about to be paid to his wife's attorney, but that "it does not have any bearing upon" his opinion [Tr. 155-156]. This though the "defendant knew that the purpose of that check was the payment of \$350.00 which the contract required him to pay to Mr. Klaw" [Tr. 155-156], and though the defendant "comprehended and understood what that check was for, and that it was issued under the contract." The foregoing would have "no consequence whatever" in respect to his opinion [Tr. 156].

Of like nature was his testimony in respect to the check for \$150.00 in payment of the three accrued weekly installments specifically called for by the separation agreement [Par. "Sixth," Tr. 48].

Shown a few random checks for weekly support under the separation agreement (out of the bundle of checks marked "Plaintiff's Ex. 10") he testified that with respect to the check dated September 6, 1943, "I feel that he *was* competent to understand what he was doing" [Tr. 157], and that in respect to the check dated October 12, 1942, the witness would give "the same answer" [Tr. 157-158].

SUMMARY OF ARGUMENT.

Appellee contends that the judgment appealed from is eminently proper because:

I.

The Separation Agreement in Suit, Made in New York, Was and Is in All Respects a Valid and Enforceable Agreement Under the Laws of New York Tr. 44-53].

Haas v. Haas, 298 N. Y. 69, 72;

Goldman v. Goldman, 282 N. Y. 296, 300;

Hill v. Hill, 23 Cal. 2d 82;

Hough v. Hough, 26 Cal. 2d 605;

California Civil Code, Sections 158, 159.

II.

The Record Amply Supports the Trial Court's Finding That the Defendant Was in All Respects Competent to Execute the Agreement in Suit.

(a) The evidence establishes overwhelmingly that the defendant knew he was being sued for separation, alimony and counsel fees before he executed the agreement in suit; that he comprehended the nature of the transaction; that he participated in negotiations and conferences with his attorneys, evincing an awareness of what was going on; that he made suggestions for changes in the draft of the agreement; that upon its execution he insisted on the deletion of a paragraph, and knowingly approved the change; that he contemporaneously executed companion documents knowing the purpose and nature of these documents and why they were being executed; and that he

fully comprehended and understood the nature of the transaction (see "Statement of Case," *supra*).

Aldrich v. Bailey, 132 N. Y. 85, 89;

Moritz v. Moritz, 153 App. Div. (N. Y.) 147,
149, 138 N. Y. Supp. 124;

Calligan v. Haskell, 143 App. Div. (N. Y.) 574,
576-7, 128 N. Y. Supp. 293;

Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541;

Haines v. Scott, 35 App. Div. 515, 518-519, 54
N. Y. Supp. 844;

Cleland v. Peters, 70 Fed. Supp. 769;

Riggs v. American Tract Society, 95 N. Y. 503,
511;

Lee v. State of New York, 187 Misc. (N. Y.) 268,
273, 64 N. Y. S. 2d 417;

Holland v. Zollner, 102 Cal. 633;

People v. Manoogian, 141 Cal. 592;

Sneed v. Marysville Gas, etc., 149 Cal. 704, 708;

De Arellanes v. Arellanes, 151 Cal. 443.

(b) The Court was not obliged to discount all the other evidence and to accept the opinion of the expert called by the defendant [Tr. 139-158].

Wirz v. Wirz, 96 A. C. A. 172, 176;

Estate of McCollum, 59 Cal. App. 2d 744, 750;

Bernstein v. Bernstein, 80 Cal. App. 2d 921, 925.

III.

By Reason of His Conscious Performance of the Agreement for a Period of Four and One-half Years, Defendant Is Now Precluded, as a Matter of Law, From Avoiding It Upon the Ground of Mental Incompetence or Other Ground.

City of Reading v. Rae (C. C. A. 3), 106 F. 2d 458, 462; cert. den. 308 U. S. 607;

Northern Pac. Ry. Co. v. U. S. (D. C. Minn.), 70 F. Supp. 836, 865;

Burk v. Johnson (C. C. A. 8), 146 Fed. 209, 217;

Burnes v. Burnes (C. C. A. 8), 137 Fed. 781, 800; cert. den. 199 U. S. 605.

IV.

The Defendant's Repudiation of the Entire Agreement in March, 1947, and His Notice to Plaintiff That He Would No Longer Perform or Abide by Its Terms, Made It Unnecessary for Plaintiff to Give Defendant Notice to Cure His Defaults. Such a Step Was Obviated and Rendered Useless and Futile by Defendant's Announced Repudiation of the Agreement. [Pltf. Ex. 2, Tr. 55-57.]

Shaw v. Republic Life Ins. Co., 69 N. Y. 286, 292;

Flagg v. Fink, 93 App. Div. (N. Y.) 169, 87 N. Y. Supp. 530;

California Civil Code, Sec. 1440;

Monson v. Fischer, 118 Cal. App. 503, 519-520;

Goldberg v. Rempp, 95 Cal. App. 452, 455;

1 Cal. Jur. pp. 343-4.

V.

The Findings and Conclusions Properly Embody the Decision of the Trial Court. In Any Event, the Appellant Has Suffered No Prejudice Whatever by Reason of the Form of the Findings or Conclusions. [Tr. 33-35.]

Rule 52, Federal Rules of Civil Procedure;

Skelly Oil Co. v. Holloway, 171 F. 2d 670 (C. A. Mo.);

Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82;

Klimkiewicz v. Westminster Deposit & Trust Co., 122 F. 2d 957; cert. den. 62 S. Ct. 663, 315 U. S. 805.

ARGUMENT.

POINT I.

The Separation Agreement in Suit, Made in New York, Was and Is in All Respects a Valid and Enforceable Agreement Under the Laws of New York. Agreements Similar to the One in Suit Are Uniformly Held to Be Not Violative of Any Principle of Public Policy and to Be Enforceable Like Other Agreements.

A legion of cases in New York uphold the validity of separation agreements there executed between husband and wife, providing for periodic and regular payments by the husband for the support of his wife. We shall cite merely two of the more recent decisions on the subject handed down by the court of last resort in that State:

Haas v. Haas, 298 N. Y. 69, 72;

Goldman v. Goldman, 282 N. Y. 296, 300.

“Such agreements, lawful where made, will be enforced like other agreements unless impeached or challenged for some cause recognized by law. It is not in the power of either party acting alone and against the will of the other to destroy or change the agreement.” (*Goldman v. Goldman*, *supra*, p. 300.)

In California too the validity of separation agreements between husband and wife of the kind here involved has become firmly rooted.

Civil Code, Secs. 158, 159;

Hill v. Hill, 23 Cal. 2d 82;

Hough v. Hough, 26 Cal. 2d 605.

In the instant case, the parties had already separated [Tr. 44, 118] and the agreement, far from being promotive of divorce, actually had in view the *discontinuance* of a pre-existing separation action.

POINT II.

The Record Amply Supports the Trial Court's Finding That the Defendant Was in All Respects Competent to Execute the Agreement in Suit.

A person who enters into an agreement in New York cannot repudiate the same on the ground of mental incapacity unless it appears that he was "wholly and absolutely incompetent to comprehend and understand the nature of the transaction" (*Aldrich v. Bailey*, 132 N. Y. 85, 89).

(See also the array of New York and California cases cited under "II" of our "Summary of Argument," *supra*, p. 13.)

No useful purpose would be served in repeating here the detailed narrative of the evidence given herein under our "Statement of the Case," *supra*, pp. 1 *et seq.* Can it be gainsaid that no other conclusion could have been reached on this record than that of the trial court at the close of the trial? The trial court said [Tr. 175]:

"It seems that the evidence discloses very clearly to the court that he had knowledge and knew what he was doing; he was perfectly competent at the time he signed this separation agreement.

"His conduct, his actions and activities in life from that time on conclusively show that he had knowledge and was perfectly competent in signing the separation agreement."

The appellant contends that the testimony of his expert, Dr. Baro, was entitled to pre-emptive and controlling weight and that all other evidence should have been brushed aside by the trial court in the enforced acceptance

of Dr. Baro's opinion. In this appellant errs. The rule has been thus stated:

Wirz v. Wirz, 96 A. C. A. 172, 176:

"This is in accord with the general rule as to opinion evidence in California which is held not to be conclusive. (*Spencer v. Collins*, 156 Cal. 298, 307 (104 P. 320, 20 Ann. Cas. 49); *May v. Farrell*, 94 Cal. App. 703, 715 (271 P. 789); *Bernstein v. Bernstein*, 80 Cal. App. 2d 921, 925 (183 P. 2d 43); 10 Cal. Jur. 971.) But in *Estate of McCollum*, 59 Cal. App. 2d 744, 750 (140 P. 2d 176), the only medical expert testified that Mrs. McCollum was incompetent to make a will. The court said: 'While this opinion was entitled to be carefully weighed by the trial judge it was not conclusive on the subject, . . . and like the evidence of any other witness could be rebutted by other satisfactory evidence.'"

Estate of McCollum, 59 Cal. App. 2d 744, 750:

"Contestants produced the only doctor who testified in the case. He was general practitioner and testified that in his opinion Mrs. McCollum was incompetent to make a will. While this opinion was entitled to be carefully weighed by the trial judge it was not conclusive on the subject, (*Estate of Arnold*, 16 Cal. 2d 573 (107 P. 2d 25)), and like the evidence of any other witness could be rebutted by other satisfactory evidence."

Bernstein v. Bernstein, 80 Cal. App. 2d 921, 925:

"Here again the trial court had the right to determine the credibility of the witnesses and also what weight should be given the expert testimony. The

court was not concluded by the testimony of the expert pediatrician, and could not give it such weight as the court deemed it was entitled to be given. (10 Cal. Jur. 971.)”

Apart from the defendant's own admissions, the opinion of lay witnesses that the defendant's behavior was rational, was competent and, if believed, could be determinative.

Holland v. Zollner, 102 Cal. 633;

People v. Manoogian, 141 Cal. 592;

Sneed v. Marysville Gas, etc., 149 Cal. 704, 708;

De Arellanes v. Arellanes, 151 Cal. 443.

That any court would give controlling weight to the opinion of Dr. Baro on this record (see narrative of his testimony on cross-examination, *supra*, pp. 9 *et seq.*), is, in our view, rather doubtful.

POINT III.

By Reason of His Conscious Performance of the Agreement for a Period of Four and One-half Years, Defendant Is Now Precluded, as a Matter of Law, From Avoiding It Upon the Ground of Mental Incompetence.

Any act on the part of a contracting party evincing his recognition of a contract as being valid and subsisting, or by way of performance of any of its terms after the alleged disability or vice is removed, constitutes a ratification. He may not be permitted to perform the agreement for a time, or to sit in silence, then at a moment which he deems to be expedient, repudiate the agreement because of

some alleged defect originally in its procuremnt. Out of the host of cases on the subject, we shall cite only the following:

City of Reading v. Rae (C. C. A. 3), 106 F. 2d 458, 462; cert. den. 308 U. S. 607;

Northern Pac. Ry. Co. v. United States (D. C. Minn.), 70 Fed. Supp. 836, 865;

Burk v. Johnson (C. C. A. 8), 146 Fed. 209, 217;

Burnes v. Burnes (C. C. A. 8), 137 Fed. 781, 800, cert. den. 199 U. S. 605;

First Nat. Bk. v. Seldomridge (C. C. A. 8), 271 Fed. 561, 563;

17 Corp. Jur. Sec., pp. 927-928;

New York Tel. Co. v. Jamestown Tel. Corp., 282 N. Y. 365, 26 N. E. 2d 295;

Finesilver v. T. G. & T. Co., 258 App. Div. (N. Y.) 946, 17 N. Y. S. 2d 868;

California Civil Code, Sec. 1588;

6 Cal. Jur., pp. 93-94.

We should like to adopt, for our view of the evidence anent the defendant's performance of the agreement for four and a half years, the following observations of the trial court voiced at the conclusion of the trial [Tr. 175]:

“Every act in his life for those four years—president of a corporation, been signing checks under this separation agreement, recognizing its validity—he knew what he was doing and knew what had been done.”

POINT IV.

The Defendant's Repudiation of the Entire Agreement in March, 1947, and His Notice to Plaintiff That He Would No Longer Perform or Abide by Its Terms, Made It Unnecessary for Plaintiff to Give Defendant Notice to Cure His Defaults. Such a Step Was Obviated and Rendered Useless and Futile by Defendant's Announced Repudiation of the Agreement. [Pltf. Ex. 2, Tr. 55-57.]

In his trial memorandum (Rule 12, Dist. Ct. Rules) the defendant inferentially conceded that his letter of total repudiation in March, 1947 [Pltf. Ex. 2, Tr. 55-57] obviated any requirement for the sending of registered letters to cure the defendant's defaults [Deft. Trial Memo., p. 6, lines 20-25]. Furthermore, the Court was amply justified in finding that any such notices would have been futile, useless and unavailing [Am. and Supp. Complaint, par. IX, Tr. 22; Finding I, Tr. 33].

In any event, where as here one announces his total repudiation of a contract, the other party is not required to send notice of default. Such futility is not required.

Shaw v. Republic Life Ins. Co., 69 N. Y. 286, 292;

Flagg v. Fink, 93 App. Div. (N. Y.) 169, 87 N. Y. Supp. 530;

Civ. Code, Sec. 1440;

Monson v. Fischer, 118 Cal. App. 503, 519-520;

Goldberg v. Rempp, 95 Cal. App. 452, 455;

1 Cal. Jur., pp. 343-4.

POINT V.

The Findings and Conclusions Properly Embody the Decision of the Trial Court. In Any Event, the Appellant Has Suffered No Prejudice Whatever by Reason of the Form of the Findings and Conclusions.

The trial court found all of the averments in the complaint to be true [Tr. 33]. Actually, the matters therein alleged were largely *undisputed*, the defense being one of avoidance, *i.e.*, mental incompetence. The amount of the defaults was not contested. The defendant stipulated in his deposition that he made no payments to the plaintiff other than those set out in the complaint [Tr. 304-306].

There was no need therefore to set forth the entire complaint *in extenso* in the findings. One can easily and readily determine what facts the Court found. Furthermore, the findings expressly recite how the Court found on the issues of incompetence and fraud or other disability [Tr. 33-34], and defendant's *knowing* compliance with the provisions of the agreement for over four years [Tr. 34].

It was not incumbent upon the trial court to make findings on every evidentiary issue, or to negative each rejected contention or averment in the answer.

Federal Rules of Civil Procedure, Rule 52;

Skelly Oil Co. v. Holloway, 171 F. 2d 670 (C. A. Mo.);

Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82;

Klimkiewicz, v. Westminster Deposit and Trust Co., 122 F. 2d 957; cert. den., 62 S. Ct. 663, 315 U. S. 805.

In any event, no prejudice to the defendant whatever is discernible from the form of the findings and conclusions.

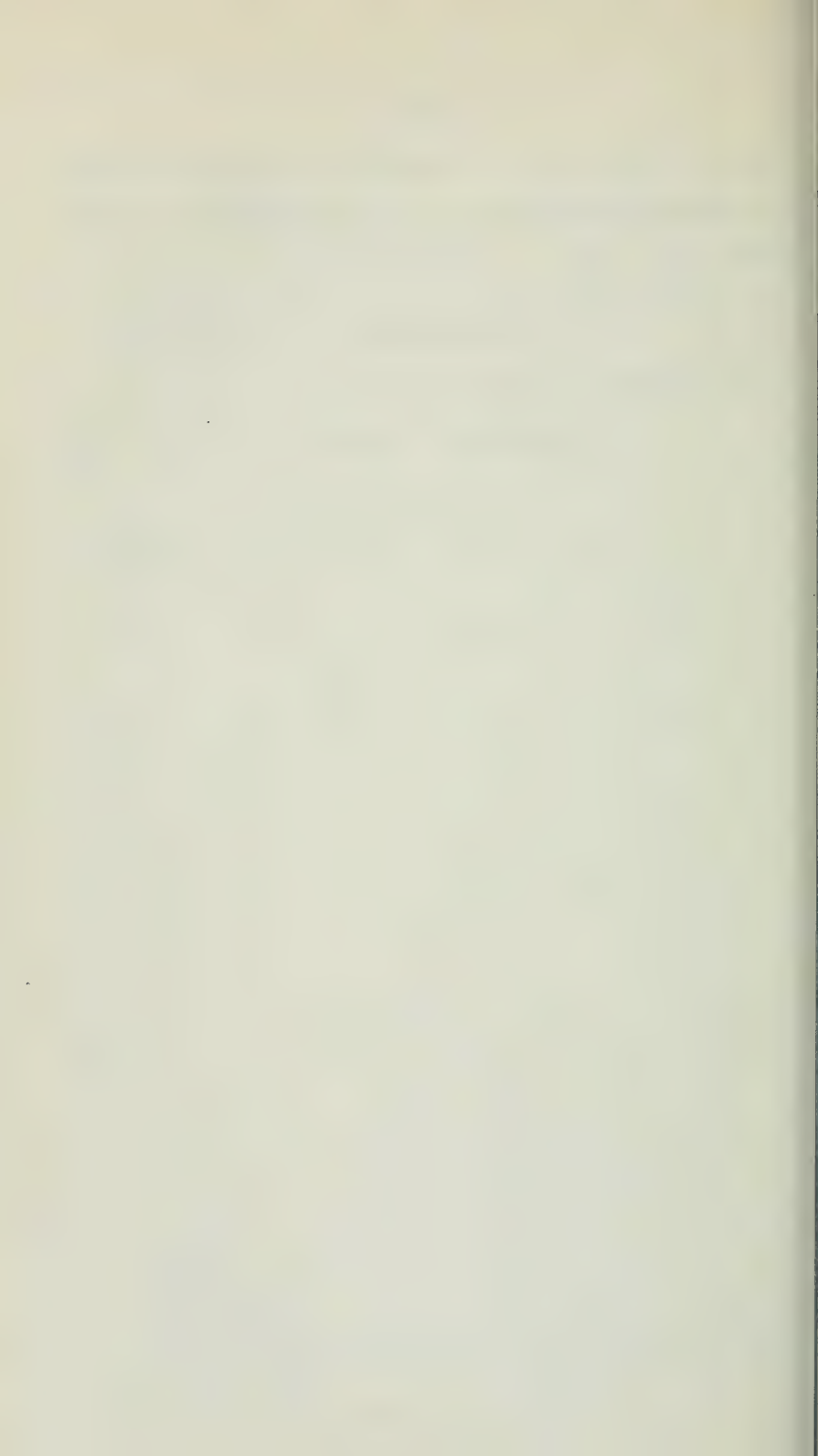
Conclusion.

The judgment should be affirmed.

Respectfully submitted,

DANIEL A. WEBER,

Attorney for Appellee.



No. 12556

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

EDWARD H. TEED,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Eastern District of Washington
Northern Division.

FILED
JUL 24 1950

No. 12556

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

EDWARD H. TEED,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Eastern District of Washington
Northern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Acceptance of Service.....	9
Attorneys of Record.....	1
Clerk's Certificate	87
Designation of Points and Request for Printing of Record.....	90
Designation of Portion of Record to Constitute Record on Appeal.....	21
Appeal:	
Designation of Portions of Record to Constitute Record on.....	21
Notice of	17
Statement of Points Relied Upon on....	18
Findings of Fact and Conclusions of Law....	14
Judgment	16
Motion to Intervene—Edward H. Teed.....	5
Notice of	6
Motion of Shirley Doores for Release of Money	2
Notice of Appeal.....	17
Opinion of the Court—Letter Dated 1/12/50..	10

INDEX	PAGE
Order Allowing Motion to Intervene.....	8
Petition in Intervention.....	6
Proceedings at the Hearing on Petition for Release of Funds.....	23
Statement of Points Relied Upon on Appeal..	18
Stipulation Re Deposition of Shirley Doores..	3
Witness, Defendant's:	
Doores, Shirley	
Deposition	40
Witnesses, United States:	
Allbright, Harry C.	
—direct	62
—cross	65
Anderson, P. B.	
—direct	66
—cross	69
Bezona, Wayne	
—direct	80
Sheehy, Mrs. Jean	
—direct	70
—cross	74
Smith, Samuel D.	
—direct	52
—cross	58
—redirect	60
—recross	61
Teed, Edward H.	
—direct	78

ATTORNEYS OF RECORD

HARVEY ERICKSON,

United States Attorney,

FRANK R. FREEMAN,

Assistant United States Attorney,

334 Federal Building,
Spokane, Washington,

Attorneys for Appellant.

PAINE, LOWE & COFFIN,

ALAN P. O'KELLY,

622 Spokane and Eastern Building,
Spokane 8, Washington,

Attorneys for Appellee.

United States District Court for the Eastern
District of Washington

Criminal No. 7702

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SHIRLEY DOORES, et al.,

Defendant.

MOTION

Comes now the defendant, Shirley Doores, and moves the Court for an order directing the Clerk to disburse to her the sum of \$6150 in the above-entitled cause. This motion is based on the files and records herein and the sub-joined affidavit.

/s/ ALLAN POMEROY,

Attorney for Defendant

Shirley Doores.

United States of America,

State of Washington, County of King—ss.

Shirley Doores, being first duly sworn on oath, deposes and says: That she is one of the defendants in the above-entitled action; that on or about the 13th day of December, 1944, affiant was the owner of and in possession of the sum of \$6150 lawful money of the United States, and that at said time the said sum was unlawfully seized from her by officers of the United States and that said funds are

now on deposit in the registry of the above-entitled Court in the above-entitled action and should be disbursed to affiant.

/s/ SHIRLEY DOORES.

Subscribed and sworn to before me this 2nd day of June, 1949.

/s/ MARIAN M. PARKS,
Notary Public in and for the State of Washington,
residing at Seattle.

Receipt of copy attached.

[Endorsed]: Filed June 6, 1949.

United States District Court for the Eastern
District of Washington, Northern Division

No.7702

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SHIRLEY DOORES, et al.,

Defendant.

STIPULATION

It is hereby stipulated, consented and agreed by and between Allan Pomeroy, attorney for the petitioner herein, and Frank R. Freeman, Assistant United States Attorney, Spokane, Washington, that

the deposition of Shirley Doores, petitioner, may be taken by and before James Royce, Notary Public, or any other Notary Public of the State of Washington, on August 12, 1949, at 2:00 p.m. and to continue from day to day until completed at the offices of Allan Pomeroy, 304 Spring Street, Seattle, Washington.

It is further stipulated, consented and agreed that notice of taking said deposition of said Shirley Doores as aforesaid pursuant to the Federal Rules of Civil Procedure be and the same hereby is waived.

It is further stipulated and agreed that any and all objections to the examination, including the form, materiality, irrelevancy and competency of any and all questions and/or answers be, and the same hereby are reserved for the trial, save and except the objections should be noted in the record at the time of the deposition hearing.

It is further stipulated that the signing of the transcript of the testimony by the petitioner is hereby waived, and further that written notice of the return and filing of said deposition is also hereby waived.

Dated: July 30, 1949.

/s/ ALLAN POMEROY,
Attorney for Petitioners.

/s/ FRANK R. FREEMAN,
Assistant United States
Attorney.

[Endorsed]: Filed August 3, 1949.

In the District Court of the United States for the
Eastern District of Washington, Northern Division
Criminal No. 7702

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SHIRLEY DOORES, et al.,

Defendant,

EDWARD H. TEED,

Intervener and Cross-Petitioner.

MOTION TO INTERVENE

Edward H. Teed moves for leave to intervene as cross-petitioner in this action in order to assert the claims set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the lawful owner and entitled to the possession of Five Thousand Nine Hundred Fifty Dollars (\$5,950.00) of the Six Thousand One Hundred Fifty Dollars (\$6,150.00) held in the registry of the Court and which the defendant in her petition filed June 6, 1949, seeks to have disbursed to her.

PAINE, LOWE & COFFIN,

/s/ ALAN P. O'KELLY,

Attorneys for E. H. Teed,

Applicant for Intervention.

NOTICE OF MOTION

To Harvey E. Erickson and Frank R. Freeman,
Attorneys for Plaintiff, and to Allan Pomeroy,
Attorney for Defendant:

Please take notice that the undersigned will bring the above motion on for hearing before this Court, in the Federal Building, Spokane, Washington, on the 6th day of September, 1949, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

PAINE, LOWE & COFFIN,

/s/ ALAN P. O'KELLY,

Attorneys for E. H. Teed,

Applicant for Intervention.

Receipt of copy attached.

[Endorsed]: Filed August 31, 1949.

[Title of District Court and Cause.]

PETITION

Comes now Edward H. Teed and alleges:

I.

That he is a resident of and domiciled in the State of Idaho, County of Kootenai, City of Coeur d'Alene, and that the defendant, Shirley Doores, is a resident of the State of Washington.

II.

That on or about the 13th day of December, 1944, the sum of Five Thousand Nine Hundred Fifty Dollars (\$5,950.00) in currency was lawfully seized by officers of the United States from a safe deposit box in The Old National Bank of Spokane, Spokane, Washington, registered in the name of Shirley Doores, which currency was and is the property of your petitioner, Edward H. Teed.

III.

That the said sum of Five Thousand Nine Hundred Fifty Dollars (\$5,950.00) in currency was obtained by Shirley Doores from your petitioner, Edward H. Teed, by means of threats, duress, fraud, extortion and blackmail.

IV.

That on October 2, 1946, the said currency in the sum of Five Thousand Nine Hundred Fifty Dollars (\$5,950.00) was delivered by the United States Marshal to the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, in conformance with an order of said Court issued September 12, 1946.

V.

That under Title 28, United States Code, Section 2041, said currency was deposited with the Treasurer of the United States in the name and to the credit of such Court.

VI.

That under Title 28, United States Code, Section 2042, your petitioner is entitled to an order directing payment of said sum of money to him.

Wherefore, your petitioner prays that the Court enter an order directing payment to him of the sum of Five Thousand Nine Hundred Fifty Dollars (\$5,950.00).

PAINE, LOWE & COFFIN,

/s/ ALAN P. O'KELLY,

Attorneys for E. H. Teed,

Applicant for Intervention.

Duly verified.

[Endorsed]: Filed August 31, 1949.

[Title of District Court and Cause.]

ORDER

This matter coming on for hearing in Open Court this 6th day of September, 1949, upon motion of Edward H. Teed to intervene as cross-petitioner in this action in order to assert claim to Five Thousand Nine Hundred Fifty Dollars (\$5,950.00) of the Six Thousand One Hundred Fifty Dollars (\$6,150.00) held in the registry of the Court, and it appearing that due notice was served upon all parties in interest, and the United States appearing by Frank R. Freeman, Assistant United States Attorney, and it

appearing that the motion of cross-petitioner Edward H. Teed to intervene should be granted,

It is hereby ordered, adjudged and decreed that the motion of cross-petitioner Edward H. Teed to intervene should be, and the same is granted.

Dated this 6th day of September, 1949.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ ALAN P. O'KELLY.

[Endorsed]: Filed September 6, 1949.

[Title of District Court and Cause.]

ACCEPTANCE OF SERVICE

Received copies of intervener and cross-petitioner's Motion to Intervene, Notice of Motion and Petition this 2nd day of September, 1949.

/s/ ALLAN POMEROY,
Attorney for Defendant.

[Endorsed]: Filed September 8, 1949.

OPINION

Chambers of
Sam M. Driver
United States District Judge
Spokane 6, Washington

January 12, 1950

Paine, Lowe and Coffin,
Attorneys at Law,
622 Spokane and Eastern Building,
Spokane, Washington,

Mr. Harvey Erickson,
United States Attorney,
Spokane, Washington.

Re: U. S. v. Shirley Doores, C-7702.

Gentlemen:

Some time ago I took under advisement the petition of intervener Edward H. Teed in the above case, for payment to him of \$5,950 of the funds on deposit in the registry of the court. I have concluded that his petition should be granted. My reasons, without detailed citation of authority, follow.

Sections 2041 and 2042 of Title 28, U.S.C. (formerly sections 851 and 852) provide for the deposit and withdrawal of funds in the registry of a district court. The person seeking the withdrawal, under the statutes, has the burden of establishing his right to the money so deposited. As I announced at the time of the trial, it is my view that the fund in con-

troversy, to the extent of \$5,950, represents money paid to Shirley Doores by Dr. Teed. Without question, she extorted it from him by falsification and by fraud, and he is entitled to recover it back unless precluded by some controlling rule of law.

The government contends that Dr. Teed may not recover the fund because the record shows him to be guilty of violation of the federal narcotics laws, conspiracy and attempted bribery, and the arrangement and agreement under which he turned over the money to Shirley Doores was connected with and in furtherance of their criminal enterprise. I have carefully examined the record, and for reasons which I shall not detail, it is my conclusion that Dr. Teed was not guilty of conspiracy, but was guilty of attempted bribery. He also violated the federal narcotics laws in giving narcotics prescriptions to Doores, but those violations had ceased before the money was paid to her. He doubtless violated the narcotics laws again in turning over large quantities of narcotics to Doores in furtherance of the attempted bribery scheme, but that violation was the result of duress and compulsion, since the narcotics were extorted from him along with the money here in controversy.

It is true, I think, as the government contends, that an illegal agreement, such as one to suppress prosecution of a crime, will not be enforced if executory, and the law will not aid a party to recover what he has paid thereunder if executed in whole or in part, where the parties to the agreement were in

pari delicto. However, where one party has acted under duress, compulsion or fraud of the other and the parties are not therefore in pari delicto or equally at fault, the court may relieve the more excusable party.

In the present case I do not regard Dr. Teed, who paid the money, and Shirley Doores, who received it, as in pari delicto. He had no intention of bribing or attempting to bribe a federal narcotics agent. By fraud, trickery and coercion she induced him to turn over to her money and narcotics under her false representation that they were to be used for the purpose of bribing a federal officer to forestall threatened prosecution. Dr. Teed should not, therefore, be precluded from recovery of the money thus extorted from him.

I shall not undertake an analysis of the cases cited in the briefs, but it is my view that none is squarely in conflict with the position I have taken here, with the exception of *U. S. v. Galbreath*, 8 F. (2d) 360. It is a district court case. While such cases, I think, are entitled to respectful consideration as persuasive authorities, they are not controlling as to other district courts. I regard the Galbreath case as contrary to the weight of authority. Its reasoning does not appeal to me. I therefore decline to follow it.

In the instant case public policy does not seem to me to require the withholding of Dr. Teed's money. Shirley Doores and her confederates have been convicted and punished for conspiracy and extortion.

Dr. Teed has been convicted and punished for violation of the Idaho state narcotics laws for his conduct in connection with this same transaction. His punishment has been very severe, since he has been deprived of the right to practice his profession. He could have been prosecuted by the United States, but he testified as a witness for the government in the trial of one of Doores' associates, and it seems fair to assume that in consideration of his assistance and, perhaps, also because of his conviction in the Idaho state court it was decided that he should not be prosecuted for his federal offenses. At any rate, the government forebore prosecution, and it seems to me that the equities do not now require the imposition upon Dr. Teed of what in practical effect would amount to a fine of \$5,950 for his six-year-old transgressions.

Findings and judgment may be presented in accordance with the views herein expressed.

Sincerely yours,

SAM M. DRIVER,

United States District Judge.

SMD:jr

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on the motion of Shirley Doores for the release of money in the registry of the court and cross-petition of Edward H. Teed for release of money to him from the registry of the court, and the court having heard the evidence and the argument of counsel, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. That on or about the 13th day of December, 1944, the sum of Five Thousand Nine Hundred Fifty Dollars (\$5,950.00) in currency was seized by officers of the United States from a safe deposit box in The Old National Bank of Spokane, Spokane, Washington, registered in the name of Vera Wilson.

2. That the defendant, Shirley Doores, had deposited said sum of \$5,950.00 in the safe deposit box referred to in Finding 1 under the name of Vera Wilson, which she used as an alias.

3. That said Shirley Doores had extorted the said sum of \$5,950.00 from Edward H. Teed, cross-petitioner herein, by falsification and fraud in that she, by trickery and coercion, induced him to turn over to her money and narcotics under her false representation that they were to be used for the purpose of bribing a Federal officer to forestall threatened prosecution.

4. That Edward H. Teed, who paid the money, and Shirley Doores, who received it, are not in *pari delicto* and Edward H. Teed had no intention of bribing or attempting to bribe a Federal narcotics agent until he was coerced and deceived by Shirley Doores as stated above.

5. That on October 2, 1946, the said sum of \$5,950.00 was delivered to the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, and has since been held in the registry of this court on deposit with the Treasurer of the United States.

6. That Edward H. Teed has been convicted and punished for violation of the Idaho State Narcotics Laws for his conduct in connection with this transaction. His punishment has been severe since he has been deprived of his right to practice his profession as physician, and the withholding of Edward H. Teed's money from him would in practical effect amount to an additional fine of \$5,950.00 for his six-year-old transgressions.

Conclusions of Law

1. That Edward H. Teed, the cross-petitioner herein, is the legal owner of and is entitled to the possession of said sum of \$5,950.00 held in the registry of the court.

2. That under Sections 2041 and 2042 of Title 28, U.S.C., the cross-petitioner, Edward H. Teed, is entitled to withdraw from the registry of the court the said sum of \$5,950.00.

3. That neither public policy nor the equities of the case require the withholding of the said sum of \$5,950.00 from Edward H. Teed, cross-petitioner.

4. That the petition of cross-petitioner, Edward H. Teed, must be granted.

Dated this 21st day of February, 1950.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ ALAN P. O'KELLY.

Receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1950.

United States District Court for the Eastern
District of Washington, Northern Division
No. C-7702

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SHIRLEY DOORES, et al.,

Defendant,

EDWARD H. TEED,

Intervenor and Cross-Petitioner.

JUDGMENT

This cause came on to be heard on Friday, October 14, 1949, and was argued by counsel and briefs

submitted by plaintiff and intervenor and cross-petitioner, and the court having entered its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the petition of Edward H. Teed for the return of Five Thousand Nine Hundred and Fifty and No/100 Dollars (\$5,950.00) held in the registry of this court should be and the same is hereby granted, and the Clerk of the Court is hereby ordered to pay over to the cross-petitioner, Edward H. Teed, the sum of \$5,950.00 held in the registry of this court.

Dated this 21st day of February, 1950.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ ALAN P. O'KELLY.

Notice of presentment waived and receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, the plaintiff above named, by Harvey Erickson, United States Attorney for the Eastern District of Washington, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from

the final Judgment entered in this action on the 21st day of February, 1950.

Dated this 19th day of April, 1950.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON ON APPEAL

The appellant states that in its appeal to the Circuit of Appeals for the Ninth Circuit from the judgment entered in the above-entitled case against the plaintiff, the appellant, on the 21st day of February, 1950, adjudging that the said Edward H. Teed, intervenor and cross-petitioner-appellee, is entitled to the return of the five thousand nine hundred and fifty and no/100 dollars (\$5950.00) held in the Registry of the above court, the appellant intends to rely upon the following points:

First: That the Court erred in making Finding of Fact No. 3, which was as follows:

“That said Shirley Doores had extorted the said sum of \$5950.00 from Edward H. Teed, cross-petitioner herein, by falsification and fraud in that she, by trickery and coercion, induced him to turn over to her money and narcotics under her false representation that they were to be used for the purpose of bribing a Federal officer to forestall threatened prosecution.”

Second: That the Court erred in making Finding of Fact No. 4, which was as follows:

“That Edward T. Teed, who paid the money, and Shirley Doores, who received it, are not in *pari delicto* and Edward H. Teed had no intention of bribing or attempting to bribe a Federal narcotics agent until he was coerced and deceived by Shirley Doores, as stated above.”

Third: That the Court erred in making Finding of Fact No. 6, which was as follows:

“That Edward H. Teed has been convicted and punished for violation of the Idaho State Narcotics Laws for his conduct in connection with this transaction. His punishment has been severe since he has been deprived of his right to practice his profession as physician, and the withholding of Edward H. Teed’s money from him would in practical effect amount to an additional fine of \$5950.00 for his six-year-old transgressions.”

Fourth: That the Court erred in making Conclusion of Law No. 1, which was as follows:

“That Edward H. Teed, the cross-petitioner herein, is the legal owner of and is entitled to the possession of said sum of \$5950.00 held in the registry of the court.”

Fifth: That the Court erred in making Conclusion of Law No. 2, which was as follows:

“That under Sections 2041 and 2042 of Title 28, U.S.C., the cross-petitioner, Edward H. Teed, is entitled to withdraw from the registry of the court the said sum of \$5950.00.”

Sixth: That the Court erred in making Conclusion of Law No. 3, which was as follows:

“That neither public policy nor the equities of the case require the withholding of the said sum of \$5950.00 from Edward H. Teed, cross-petitioner.”

Seventh: That the Court erred in making Conclusion of Law No. 4, which was as follows:

“That the petition of cross-petitioner, Edward H. Teed, must be granted.”

Eighth: That the Court erred in making its judgment ordering and directing the return to Edward H. Teed, as intervenor and cross-petitioner-appellee, the sum of five thousand nine hundred and fifty and

no/100 dollars (\$5950.00) now held in the Registry of this Court.

Dated this 19th day of April, 1950.

/s/ HARVEY ERICKSON,

/s/ FRANK R. FREEMAN,

Attorneys for Plaintiff-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1950.

[Title of District Court and Cause.]

DESIGNATION OF PORTION OF RECORD
TO CONSTITUTE RECORD ON APPEAL

Comes now the plaintiff-appellant, United States of America, and hereby designates that portion of the record to be transmitted to the United States Circuit of Appeals for the Ninth Circuit and to constitute the record in the above-entitled case, to wit:

1. Petition of Edward H. Teed as Intervenor and Cross-Petitioner.
2. Order of the Court granting right to intervene, dated September 6, 1949.
3. All exhibits.
4. Stenographic transcript of witnesses' testimony.

5. Opinion of the Court, dated January 12, 1950.
6. Findings of Fact and Conclusions of Law,
dated February 21, 1950.
7. Judgment, dated February 21, 1950.

/s/ HARVEY ERICKSON,

/s/ FRANK R. FREEMAN,

Attorneys for Plaintiff-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1950.

In the District Court of the United States for the
Eastern District of Washington, Northern Division

No. C-7702

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SHIRLEY DOORES, et al.,

Defendants,

EDWARD H. TEED,

Intervener.

RECORD OF PROCEEDINGS AT THE
HEARING ON PETITION FOR RELEASE
OF FUNDS

October 1, 1949

Before Honorable Sam M. Driver,
United States District Judge.

Appearances:

HARVEY ERICKSON,

United States Attorney, and

FRANK R. FREEMAN,

Assistant United States Attorney,

For the plaintiff United States of
America.

R. E. LOWE and

ALAN P. O'KELLY, of

PAINE, LOWE & COFFIN,

Attorneys for the Intervener.

Be It Remembered that the above entitled cause came on before the Honorable Sam M. Driver, United States District Judge, sitting without a jury, on Friday, October 14, 1949, upon the application of Shirley Doores for the release of certain monies impounded in this Court; the United States of America being represented by Harvey Erickson, United States Attorney, and Frank R. Freeman, Assistant United States Attorney for the Eastern District of Washington, of Spokane, Washington, the defendant Shirley Doores being not personally present, represented by Allan Pomeroy, attorney at law of Seattle, Washington, not personally present; the petitioning intervener Edward H. Teed being personally present and represented by his counsel, Roy Lowe and Alan P. O'Kelly, of Paine, Lowe & Coffin, attorneys at law of Spokane, Washington, whereupon the following proceedings were had and done, to wit:

The Court: I just this morning received a letter from Allan Pomeroy, attorney representing Shirley Doores, a Seattle attorney, and in this letter he says that due to events which have occurred here in Seattle it will be impossible for me to be in Spokane for the hearing in the above entitled action on Friday, October 14, 1949, therefore the matter is being submitted to you without argument. That is,

I assume, so far as he is concerned. Mr. Pomeroy also says, "in further support of the motion please find enclosed photostatic copies of the bank statements in the name of Mrs. Shirley Clayton," and so forth. The writer apologizes for being unable to properly present the matter. Now, have counsel seen these photostatic copies?

Mr. Lowe: No. We received copies of his letter.

The Court: You haven't seen photostatic copies of the bank records, however? The situation is unusual, and somewhat awkward. I doubt if there would be any basis for admission of these photostatic copies except on stipulation of counsel, unless counsel are willing to stipulate that they be admitted. Have you looked them over?

Mr. Freeman: Yes, we have, and we would except to their admission.

Mr. Lowe: We would object to their admission as being too remote, not properly identified, no opportunity to cross-examine. [2*]

The Court: Well, I'm not sure what Mr. Pomeroy had in mind, but I think he had in mind presenting them, certainly, as evidence, so if you'll mark them, Mr. LaFramboise, as Doores identification. The moving party is Shirley Doores, who moved originally for the release of the money. Your client is Edward H. Teed, intervener?

Mr. Lowe: Yes; and did you set up a claim for it?

Mr. Freeman: No, we have not filed the formal motion to resist the petitions, but may the record show that I appear on behalf of the government?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

The Court: This whole thing, of course, is in the criminal case of United States of America against Shirley Doores.

Mr. Freeman: And Clayton, et al., yes.

The Court: So I suppose unless and until there is an appeal we may as well preserve the identification appearing in the original case, United States, Plaintiff; Shirley Doores, Defendant, and Edward H. Teed, intervener. That would serve the practical purpose of identifying them. Now, when you get that marked may I see it again?

(Whereupon, photostatic copies of bank statements were marked Doores Exhibit 1 for identification.)

The Court: Is this referred to or identified in any way [3] in the deposition, Mr. Freeman?

Mr. Freeman: No, your Honor.

The Court: Well, I'll consider that this document, identification 1, is offered in evidence, and there is objection to it?

Mr. Freeman: Objection, yes, your Honor.

The Court: I'll have to sustain the objection. There isn't a proper foundation laid, certainly for its admission. Now, I'm familiar in a general way with this controversy, but I think it might be helpful if you'd give me a short statement of what the situation is here and what the issue is.

Mr. Freeman: Yes, your Honor. In 1944, if your Honor please, I think in October or November of that year, this matter came to trial, United States vs. George Clayton, Shirley Doores, Ed Kelley, and I think another.

The Court: Bribery, or attempted bribery?

Mr. Freeman: In substance. There were four counts, I believe one of conspiracy, conspiring to extort money from one Dr. Teed, who is the intervenor here, and the several counts charge Shirley Doores with aiding or abetting in the extortion, and one count charges substantively the extortion of money from Dr. Teed. If your Honor will permit I'd like to give you a short resume of what the case was about. In 1943 Dr. Teed was a practicing physician in Coeur d'Alene. Sometime around the first part of 1944, while he was so practicing as a [4] physician in Coeur d'Alene, he was approached by Shirley Doores, who is one of the petitioners here, and she secured from him a number of prescriptions for narcotics. I'll not go into that any further. In any case, after having secured I think fourteen or sixteen of these prescriptions both for herself and for a third party whom the doctor had never met, but whom she contended to the doctor was suffering from a serious ailment which required narcotics, and after having got these prescriptions from Dr. Teed, she reappeared in his office some six or eight weeks after the first prescription was gotten, and told him that a narcotic officer in Seattle by the name of W. G. Graven, she called him, had learned of the execution of these prescriptions and had a warrant for his arrest, and she told him in substance that she had had dealings with Mr. Graven in Seattle before, and that she would be able to fix him. On the strength of that

representation she told Dr. Teed, I think the first payment was \$3500.00, \$3500.00 would be required from Dr. Teed to her, and she in turn would use it to fix Mr. Graven, he is a narcotic officer in Seattle, and see that he wasn't arrested or would not be further bothered with these narcotic prescriptions. That \$3500.00 was given to Shirley Doores. Within a short time afterwards she again appeared—I think after the \$3500.00 was paid a man then presented himself at Dr. Teed's office, who said that he was Mr. W. G. Graven, a narcotic inspector from Seattle. In the meantime it [5] might be said that Dr. Teed in his testimony admitted he knew there was a W. G. Graben who was a narcotic officer stationed in Seattle, but had never met him, so this man, who turned out to be Kelley, one of the defendants, turned up and said, "I am W. G. Graven; I have a warrant for your arrest, here are my credentials," and pulled them out of his pocket, didn't present them, and put them back in his pocket. He told the doctor he had a warrant for his arrest. He indicated to the doctor that he could be, in substance, fixed.

Shirley Doores and the man purporting to be Mr. Graben left the office, and within a week Shirley Doores again appeared and said \$3500.00 wasn't enough, and I think on the second trip she stated that an additional figure of, if I'm not mistaken, \$3,000, two or three thousand dollars, was necessary additional. I think she stated at that time that Mr. Graven had some other fellow employees in the

narcotic office who also would have to be fixed, and mentioned specifically a Mr. Bangs, and incidentally, there was a Mr. Bangs in the office in Seattle, and Dr. Teed being fearful of arrest, a second \$3,000 was passed. A short time afterward Shirley Doores again appeared to Dr. Teed, perhaps not at the office, and indicated to him the second payment was not sufficient, and that \$6500.00 more would be required, which Dr. Teed secured and paid her, an additional \$6500.00, to fix both Mr. Bangs and Mr. Graben in Seattle. [6]

As a result, and without going further into detail, it is Dr. Teed's contention, and was substantially proven at the trial, that a total of \$14,270.00 was paid by Dr. Teed to Shirley Doores as and for the purpose of bribing or attempting to bribe what he supposed was a federal narcotic officer in Seattle by the name of Graven and another by the name of Bangs, when of course in truth Mr. Graben or Mr. Bangs had no knowledge, and this Mr. Kelley appeared and represented himself as being Mr. Graben. That's the substance of the case, if your Honor please. Clayton, incidentally, engineered the scheme, and Shirley Doores and Kelley were instrumental in carrying it out. I think Clayton made the statement that he was afraid he might be known to Dr. Teed if he personally presented himself to Dr. Teed, so he, after engineering the scheme, left it to Shirley Doores and Kelley and Shirley's brother to carry out, so in substance during the course of this two months or longer she ob-

tained \$14,270.00, then after he had paid that much he began to get suspicious and called in the sheriff and had them arrested, and that is the case out of which this case arose, heard before Judge Schwellenbach in 1944, appealed to the Circuit Court of Appeals, and there affirmed.

The Court: There's a defendant by the name of Clayton?

Mr. Freeman: Oh, yes, this is most material. May I digress for a moment? As far as the money here involved is [7] concerned, the \$5,950.00 plus an additional \$200.00, or \$6,150.00, is in the registry of the court. Your Honor will recall about a year ago you signed an order depositing it in the registry of the court. Before the trial of this case Shirley Doores while incarcerated was brought before Mr. Connelly, in the presence of Mr. Smith, who was with the F. B. I. at that time, and in Mr. Connelly's office she told Mr. Connelly she had some of this money in a safe deposit box under the name of Vera Wilson. I think she petitions now as Velma Rock, which is also an alias. In any case, she admitted to Mr. Connelly and Mr. Smith that the money was Dr. Teed's, and she took them to the Old National Bank to a safety deposit in the name of Vera Wilson and removed therefrom in the presence of Detectives Allbright and Anderson, and Ray Lamb, and Mr. Smith, as well as the Marshal, she removed from the box in her assumed name the sum of \$5,950.00 in twenty, fifty and one hundred dollar denominations, and again admitted at that time that it was Dr. Teed's money.

The Court: The position of the government in this case, then, was a stakeholder, or do you claim that the money should remain in the registry of the court?

Mr. Freeman: It's our contention the money should remain in the registry of the court, and that it was a part of the fruit of the crime, and being in *pari delicto*, neither has a right to its recovery. The other \$200.00 was in a safe [8] deposit box in the First National Bank in Spokane. Are there any further questions? It's an involved case, and I've give you probably a brief statement.

The Court: I think that's a sufficient background. Do you have anything to add to it, Mr. Lowe?

Mr. Freeman: May I add one last sentence? At the time of the trial of this case the Marshal, Mr. Bezona, was called as a witness and asked to produce the \$5,950 or \$6,150 in his possession, and he stated that he had compiled a list of the bills, ten, twenty, fifty and one hundred dollar bills, and their serial numbers, and Judge Schwellenbach admitted those in evidence in place of the actual cash.

Mr. Lowe: Counsel has made a very fair statement of the facts. I would submit some additional things for the information of the court. Dr. Teed is claiming the \$5,950 which was in the safe deposit box in the Old National. The other \$200.00 was in some other box, and it was not claimed, I believe, that that was money received from Dr. Teed, so we're not claiming that. Also I might say this:

We had a conference with Mr. Freeman the other day, and we reached a conclusion in our own minds with which I believe he agreed, that as far as the government and Dr. Teed is concerned there's no dispute about the facts. We were anticipating a situation where we were both going to have to resist Shirley Doores' claims, and she's not here, she's out of the way. It is necessary, I [9] believe, on the part of Mr. Freeman and myself that these admissions were made that this is the same identical currency as was secured from Dr. Teed.

The Court: Let's see, now, were you planning on using the deposition of Shirley Doores?

Mr. Lowe: No; she denied it was the same money.

The Court: Do you have the deposition?

Mr. Freeman: I have the deposition, your Honor, however, I think probably—it was my belief that Shirley would of course testify here, and for that reason the deposition is not as complete, as I expected it would be supplemented, of course, with her cross-examination here, and for that reason I think probably I should object, if I'm not in a position to withdraw it, to object to its admission before the court, because it is not complete and does not purport to be complete.

Mr. Lowe: I have never seen the deposition, but from what Mr. Freeman tells me of the contents, we would likewise object to it.

The Court: The Court is in rather a difficult position when neither the claimant nor the attorney appears, and yet submits the matter. I feel their

interests should be protected insofar as the Court can protect them.

Mr. Freeman: That's true.

The Court: Here's the statement with reference to the deposition: "Mr. Freeman took a deposition from Shirley [10] Doores here in Seattle this last summer, and if he makes it available to the court by filing it herein, we submit that testimony in support of the motion." That's a rather equivocal statement, in a way; Mr. Freeman hasn't filed it.

The Clerk: The deposition is required to be filed in my office by the court reporter who took the deposition. That has been done, but the deposition has never been published.

The Court: Mr. Freeman has not asked for its publication. Possibly I interrupted you.

Mr. Lowe: I interrupted myself, as a matter of fact. In addition to the statement Mr. Freeman gave, I think the record in the other case shows both Clayton and Kelley denied they received anything except a very small portion. Shirley held out on them; I believe she told them she got \$1400 or \$1500, and according to their own testimony, she didn't testify as to those facts, according to their testimony they received only a very small amount of it. Also the evidence shows in this case and we expect to show here that within a very few days after this woman received the first payment from Dr. Teed she rented a safe deposit box in the Old National Bank, the original signature card is in the record of the case, together with various entry cards later on which correspond very closely to the days when she

received these additional payments from the doctor; I think I'm correct on that.

Mr. Freeman: Yes, that's correct. [11]

Mr. Lowe: April 24 she opened the box, and I believe she received the first payment the 17th or 18th, and the opening of the box at later times correspond to times she received the funds.

The Court: This is a proceeding that grows out of this criminal prosecution. Is it your thought that the Court could consider the testimony and the exhibits in this principal case in connection with this further problem? I doubt that.

Mr. Lowe: I doubt it myself, but I suggested to Mr. Freeman, and I think he's in accord with that, he anticipated that Dr. Teed might testify differently in this hearing than he did before, and this is our stipulation, that we use the cross-examination of his testimony at the trial before. I suggested that we were willing that the whole record be submitted to the Court for consideration.

Mr. Freeman: Including the exhibits.

Mr. Lowe: Including the exhibits. What bothers me is we have this other claimant in the case not present in the court room. Mr. Freeman and I would agree very quickly that the whole record be submitted to the court, and that would save calling Dr. Teed. It was purely a charge of extortion from Dr. Teed, and he was the principal witness for the government, and we're willing to submit his testimony and all the testimony in the other case. In fact, we have the record here of the testimony, prepared to give it to the court. [12]

The Court: I wonder perhaps if a little safer procedure might not be—I doubt that I can take stipulations of you two, since the other party is before the court, and I wondered if it might not accomplish the same purpose if one of you would offer the testimony you wish to bring in here, or whatever you wish to use from the record, and if there's no objection made, I think I could admit it; if the party isn't here to object I wouldn't think he'd be in a position to object on appeal.

Mr. Freeman: Before that is done, I wonder, has Shirley Doores or her attorney been advised of the consolidation of these two petitions?

The Court: The notice which was sent out specifies both matters here. It gives notice of the time of trial of the motion of Shirley Doores for release of money in registry, and petition in intervention of Edward H. Teed, so that Miss Doores and her attorney have notice that both these matters would be heard today.

Mr. Lowe: As a matter of fact it might be well, we have a letter from Mr. Pomeroy acknowledging receipt, haven't we, and suggesting we might get together, or something? It might be well to put that in the record.

The Court: The attorney in this letter which I received this morning doesn't ask for a continuance or protest the hearing in any way; he simply indicates very clearly that he's [13] submitting it, and if you have the printed record of the testimony there, or a copy, why not offer it in evidence, Mr.

Freeman? The exhibits will be printed, I suppose.

Mr. Freeman: They're printed in the record, if your Honor please.

Mr. Lowe: The original exhibits are in the clerk's office.

Mr. Freeman: We can stipulate probably that the original exhibits can be attached to this record, but we in consolidation, the United States Government as well as Dr. Teed, by joint motion offer the complete record in the case of George Clayton vs. United States of America in evidence, as well as the original exhibits in the matter offered at the time of trial.

The Court: It's understood the clerk may attach the exhibits?

Mr. Lowe: Yes.

The Court: If you'll mark them, they will be admitted, then.

(Whereupon, transcript in two volumes, record on appeal in #10972, was marked U.S.A. Exhibit No. 2 for identification.)

Mr. Freeman: Incidentally, I've underscored just a few pages in that record, not very much.

The Clerk: I may have another printed copy of this in my office; it wouldn't have the notes. [14]

The Court: Is it all right for Mr. LaFramboise, then, to get his copy out of the clerk's office, and Mr. Freeman can have his. It would be inconvenient for you, I presume, to have to mark another copy.

Mr. Lowe: We were unable to find one the other day up at Mr. LaFramboise's. There's nothing in there to prejudice the Court.

The Court: Well, mark this one, and it's understood he may replace it with the other copy if he finds it in the clerk's office.

Mr. Freeman: Your Honor, if another copy isn't found may I have the right to use that as well as the Court?

The Court: Yes, you may use that. Now, I'm not sure just who is the moving party here. I think originally Shirley Doores was the one who presented the first motion, wasn't she?

Mr. Freeman: Yes, your Honor.

The Court: It doesn't make any difference, really.

Mr. Lowe: His witnesses are our witnesses, too. There's one witness I interviewed, and it will not be necessary to call him because of the stipulation. Mr. Freeman has some witnesses here whom he's told us about.

The Court: Now, the matter of this deposition bothers me. I understand that Mr. Freeman objects to its publication. Have you any objection, Mr. Lowe, that you wish to urge about [15] it?

Mr. Lowe: Certainly if counsel were here, or his client, I would object to the deposition being used, no question about it. I don't want to have any error in the record so far as Shirley Doores is concerned.

The Court: I'm a little bit concerned about that situation, since counsel has indicated for Shirley

Doores that he desires the deposition. I'll say this, that I feel I should offer its publication in behalf of Shirley Doores, since her counsel has indicated he wishes to use it. Now, I'll hear any objection you have. I think you've already indicated an objection.

Mr. Freeman: Yes.

The Court: As I understand, neither one of you wishes to be sponsor for it.

Mr. Lowe: We will join in the government's objection.

The Court: It will be published, then, over objection of the parties. Was Shirley Doores convicted of a felony in this proceeding here?

Mr. Freeman: Yes, your Honor.

Mr. Lowe: She pleaded guilty.

The Court: Does that appear in her deposition?

Mr. Freeman: I think, yes, it does. The number of counts isn't mentioned.

The Court: The thought I had in mind is whether the court [16] could take judicial notice of her conviction, in passing upon her credibility as a witness.

Mr. Lowe: She was called as a witness in the main case just to testify to one fact, and at that time testified she had pleaded guilty and was awaiting sentence.

Mr. Freeman: And in this deposition she acknowledges her conviction.

The Court: Do you have copies of this Mr. Freeman?

Mr. Freeman: Yes, I have a copy, if your Honor please.

The Court: I wonder if it wouldn't be helpful and make for an orderly procedure here if we'd have this read. If one of you will ask the questions and the other make the answers I think it will be a little more intelligible.

Mr. Lowe: As a convenience and a courtesy to our opponent, who is not here.

The Court: Yes, and I think it would be more helpful to the Court.

(Whereupon, having been duly published by order of the Court, the deposition of Shirley Doores was read, as follows:)

Oral Examination Prior to Trial of
Petitioner Shirley Doores
August 12, 1949

Appearances:

Allan Pomeroy, Esquire, Attorney-at-Law, [17] appearing for and on behalf of Petitioner.

Frank R. Freeman, Esquire, Assistant United States Attorney, appearing for and on behalf of Plaintiff.

Mr. Freeman: It is stipulated and agreed by and between Mr. Allan Pomeroy, attorney for Petitioner Shirley Doores, and myself as Assistant United States Attorney, that the deposition of Shirley Doores may be taken at 1905 Smith Tower, Seattle, Washington, on this 12th day of August, 1949, at two o'clock p.m.

It is further stipulated by and between respective counsel that statutory notice for the taking of such deposition is waived.

It is further stipulated that the signature to the deposition is waived; and that all objections including as to form, materiality, relevancy, and competency as to any and all questions and answers are reserved until the time of trial, and they are not deemed to be waived by failure to take same during the examination.

Mr. Pomeroy: That is agreeable.

DEPOSITION OF SHIRLEY DOORES

SHIRLEY DOORES

being first duly sworn, was examined and testified on oath as follows:

Direct Examination

By Mr. Freeman:

Q. What is your name, please?

A. Shirley Doores.

Q. Is that Miss or Mrs.? [18]

A. My name is really Mrs. Shirley Rock, but this case was under the name of Shirley Doores.

Q. You are presently known as Mrs. Shirley Rock?

A. Yes.

Q. I will refer to you, if you don't mind, as Shirley Doores during the taking of this deposition.

A. That is all right.

Q. Miss Doores, you are the Petitioner in this matter—that is, you have filed a petition in federal court seeking to recover some \$6,150 taken from

(Deposition of Shirley Doores.)

your possession some time during May, 1944, just previous to the trial of the Clayton-Doores extortion case? A. Yes.

Q. Now, Miss Doores, that \$6,150 was taken from your possession how? How was it taken—just for the record? Was it located in a safe deposit box or where? A. Yes, I voluntarily turned it over.

Q. All of the \$6,150? A. Yes.

Q. I think there was \$5,950 located in the safety deposit box at the Old National Bank in Spokane, and wasn't there an additional \$200 in the safety deposit box at the First National Bank in Spokane?

A. Yes.

Q. So that there was a total of \$6,150 that you are seeking [19] to recover in all? A. Yes.

Q. Now, you say you voluntarily turned it over *the* the government? A. Yes, I did.

Q. To whom?

A. To Ed Connelly. No, I am not sure he was there that time. Possibly he wasn't. But Mr. Bezona and——

Q. And Mr. Smith of the F. B. I.?

A. I don't remember any of the names, Mr. Freeman, but Mr. Anderson.

Q. Do you remember Mr. Albright?

A. I don't believe Mr. Albright was there, although I am not sure of that. I don't exactly remember how many were there. There were several in there that day. I remember Mr. Bezona. Yes, Mr. Albright was there, too, and the federal men.

(Deposition of Shirley Doores.)

Q. Now, prior to the time you and these officers were down to the Old National Bank in Spokane you had a discussion with Mr. Connelly in his office in the United States Attorney's office in Spokane?

A. Yes, I did.

Q. What was the crux of that conversation with respect to this money?

A. Oh, Mr. Connelly asked me if I had any money on me and I [20] said, "Mr. Connelly, I can turn you over an amount of money. I am not saying it is Teed's. It is my money. I can turn it over to you."

Q. Who was present in his office at the time that conversation took place?

A. I remember Mr. Anderson being there and someone else, but I don't remember who.

Q. Do you recall Mr. Albright being there?

A. No, I don't.

Q. Or any of the F. B. I. men?

A. Yes, I am quite sure there was one man, there. They had taken me over, and coming back we were in the car, and in the car they had asked me, "Shirley, have you got any money? You would be better off to turn it over to this man, and if it is your own, it can be proven so, and you will be able to keep it." So I think there were two men that was in the car that day. I definitely remember Mr. Anderson because he was the one who brought me from the city jail to Commissioner Kelly.

Q. Was that the same day that you were in Mr. Kelly's office?

(Deposition of Shirley Doores.)

A. That was the same day. Now, wait a minute. I don't remember whether I met him or whether they called me and told me, but I am quite sure we were up——

Q. To Mr. Connelly's office.

A. And he said, "Go ahead and take her out."

Q. Can you place in your mind the approximate date of the conversation with Mr. Connelly in his office?

A. I asked to speak to Mr. Connelly alone.

Q. Would you say that was some time in May 1944 approximately?

A. I was arrested in May, is that right?

Q. I think so; early May.

A. Maybe it was four or five or six days after I was arrested or three days.

Q. Now, you don't recall specifically whether Smith of the F. B. I., one of the F. B. I. agents, was in the office?

A. No, I don't although I think I have seen him. I was in rather bad condition that day.

Q. And at that time you advised Mr. Connelly that you had some money in your safety deposit box?

A. I will tell you——

Mr. Pomeroy: Just answer the question he asks. Don't volunteer a lot of stuff, but wait until he asks the question.

A. Yes.

Q. And at that time did you advise Mr. Connelly that you had some money in your safe deposit box?

A. Mr. Connelly informed me that they were

(Deposition of Shirley Doores.)

taking my picture around to all the banks and safety deposit boxes, and if I had any money, sooner or later it would be found. He said, "There is no use for all you people to be in trouble." [22] I had told Mr. Connelly Mr. Clayton had nothing whatsoever to do with it, and when he spoke about the money I said, "The only thing I can do is give you my money."

Q. Did you mention at that time how much money you had in the safety deposit box?

A. No.

Q. You did specifically tell him, however, it wasn't your money at that time?

A. I told him it was not Teed's money. I said it was my money and not Teed's money.

Q. Did you go from there, Mr. Connelley's office, down to the safety deposit box at the Old National Bank?

A. I went out to my home first and from my home back to the safety deposit box.

Q. I did not hear you.

A. I went from my home to the box.

Q. To the Old National Bank? A. Yes.

Q. And that box was under whose name?

A. I had it under the name of Vera Wilson.

Q. Who is Vera Wilson?

A. I used it as an,—well—

Q. Vera Wilson was an alias of yours?

A. Yes.

Q. Who was present at the time the safety de-

(Deposition of Shirley Doores.)

posit box at [23] the Old National Bank was opened,—to the best of your recollection?

A. Mr. Anderson, Mr. Bezona, Mr. Albright, and the other man I don't remember.

Q. Do you recall whether any of the F. B. I. agents were there?

A. Yes, I believe there was.

Q. You don't recall any of their names?

A. No.

Q. How much was taken, do you recall, from that safe deposit box? How much money?

A. \$5,950.

Q. In currency? A. Yes.

Q. All in currency? A. Yes.

Q. Do you recall the denominations of those bills?

A. I think there was some fifties and hundreds. I don't remember whether there was any smaller than that or not.

Q. And to whom did you give it? Did you take them out of the safe deposit box yourself?

A. No, they opened the box themselves and took it out.

Q. What happened to the key to that box? Did you have it in your possession prior to the opening of the box? A. Yes, I did. [24]

Q. What did you do with the key?

A. They took the key.

Q. You gave them the key? A. Yes.

Q. Now, after the box was opened this money

(Deposition of Shirley Doores.)

was taken from the box by whom, do you recall?

A. They were all standing around there.

Q. Was the money counted in your presence?

A. Yes.

Q. Did you make any statement to these officers as the money was being taken out of the box that the money was yours?

A. The only thing I said was, it wasn't Dr. Teed's money.

Q. It wasn't Dr. Teed's money?

A. That is right.

Q. Did you make any statement as to whose money it was? A. Yes.

Q. What statement did you make?

A. I said my father had given me the money.

Q. You said your father gave you all the \$5,950?

A. Yes, I did. In fact, he gave me more than that.

Q. He gave you more than that? A. Yes.

Q. Now, do you recall there was an additional \$200 taken from the safe deposit box at the First National Bank of Spokane? Is that right? [25]

A. Yes.

Q. Were you present at the time that was taken?

A. No.

Q. Did you make any statement to anyone as to whose money that \$200 was? A. No.

Q. Is it not a fact that you said the \$200 which was taken from the box at the First National Bank belonged to your father?

(Deposition of Shirley Doores.)

A. I could have, but I don't remember.

Q. And is it your recollection now with reference to the \$5,950 taken from the safe deposit box at the Old National Bank at Spokane that you said to the officers that that was your father's money or given to you by your father?

A. Yes, I think so.

Q. You said that was your money given to you by your father? A. Yes.

Q. Now, do you recall, Miss Doores, stating at the time you were in Mr. Connelly's office or later at the Old National Bank at Spokane,—to any of these officers or to Mr. Connelly or any of the F. B. I. operatives that this money belonged to Dr. Teed? A. If I did, I don't remember it.

Q. If you did, you don't remember it?

A. No. [26]

Q. Would you say that you did not?

A. I frankly don't remember. I was under the influence of narcotics.

Q. Now, Miss Doores, how many days had you been in jail prior to the time those boxes were opened?

A. I had been in jail,—I believe it was from a Wednesday to Monday, but we went out to the house first,—my home.

Q. Do you advise us now that you had some narcotics at your home? A. Yes, I did.

Q. You were under the influence of narcotics at the time you went to the box? A. Yes.

(Deposition of Shirley Doores.)

Q. From whom did you get the narcotics?

A. I did not get them from anyone. They were in the bathroom. I went in and got them.

Q. And from your home you went directly to the box at the bank? A. Yes.

Q. Then I understand that during the time of the conversation in Mr. Connelly's office you were not under the influence of narcotics?

A. I was sick.

Q. You were sick?

A. I was so sick I could hardly move. [27]

Q. Do you recall quite plainly the conversation that took place in Mr. Connelly's office?

A. Not everything, no.

Q. Do you recall fairly well the conversation that took place between you and the officers down at the Old National Bank at Spokane in the safety deposit vault? A. No, I don't.

Q. Now, Miss Doores, your petition for the return of this money, the \$6,150, is on the basis that it is your money? A. Yes.

Q. And that it is not and never was Dr. Teed's money, is that right? A. Yes.

Q. Miss Doores, after that money was taken from your safe deposit boxes in the First National and the Old National banks at Spokane did you subsequently make to anyone any statement to the effect that it was your money and not Dr. Teed's?

A. I said that in counting the money.

Q. Where was that?

(Deposition of Shirley Doores.)

A. Right in the place; right in the bank.

Q. Right in the bank. But I mean later, after you had left the bank. Did you ever inform any-one it was your money and not Dr. Teed's money? Did you make any claim to any of that money or for the return of it? [28]

A. At the time?

Q. No, later. Subsequently. After the money was taken from the safe deposit box.

A. The suing case was brought against——

Q. The suing case? A. Yes, by Dr. Teed.

Q. By Dr. Teed against you?

A. Yes. Then Dr. Teed started suit against me for what was supposed to be \$14,000 I took from him.

Q. What has that to do with the question I asked you?

A. Well, they put the hold on the home and the car, and said the money would be held in Mr. Connelly's office.

Q. The \$6,150? A. Yes.

Q. Did you at that time make your claim for the return of this money to you?

A. I don't remember whether I did or not.

Q. As a matter of fact, Miss Doores, since the day this money was taken from the safety deposit box you made no claim for the return of this money, is that right?

A. Yes, I tried to get Gleason—Harold Gleason.

Q. Did you go up and see Mr. Connelly again

(Deposition of Shirley Doores.)

about the return of this money?

A. I did not see Mr. Connolly about it. After I got my sentence I tried to pay Mr. Clayton's fine. [29]

Q. Your only basis then on which you seek to recover this money is that it is yours, is that right? A. That is right.

Q. You make no contention it was unlawfully seized from you?

A. I had already spent what I had gotten from Dr. Teed.

Q. I am talking about this money. You voluntarily turned the money over to Mr. Connolly as a federal officer? A. Yes.

State of Washington,
County of King—ss.

I, James R. Royse, a notary public in and for the State of Washington residing at Seattle in said county and state do hereby certify:

That the annexed and foregoing pre-trial oral examination of Shirley Doores, Petitioner, as an adverse witness at the request of plaintiff was taken before me on the 12th day of August, 1949, beginning at the hour of two o'clock p.m. in room 1905, Smith Tower building, Seattle, Washington, pursuant to oral stipulation between counsel and was thereafter reduced to typewriting under my personal direction; and

I certify that the above named witness before

examination was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth; and

That the requirement as to the signing of this testimony by said witness was by counsel expressly waived; that this [30] pre-trial oral examination as heretofore annexed is a full, true and correct transcription of all the testimony of said witness including questions, answers, and statements of counsel; and

That this pre-trial oral examination has been retained by me for the purpose of filing with the Clerk of the United States District Court in the United States Court House at Spokane, Washington; and

Lastly, I certify that I am not connected with or related to any of the parties to said action or their respective counsel, and I am not interested in the event of the cause.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 15th day of August, 1949.

/s/ JAMES R. ROYSE,

Notary Public for the State of Washington, residing at Seattle.

(Notarial seal affixed, commission expires Dec. 3, 1951.) [31]

The Court: Do you wish to proceed, then, Mr. Lowe, or would you prefer to have Mr. Freeman?

Mr. Freeman: Well, your Honor, I think probably we should finish Miss Doores' part of the case. We have some testimony here in refutation of her representations.

The Court: I think that might be the orderly way to do it.

The Clerk: On the offer made jointly by Mr. Lowe and Mr. Freeman I don't believe the record is clear that you have admitted those exhibits.

The Court: The record may show that identification number 2 offered by the United States, the record which includes the original exhibits, will be admitted in evidence.

Mr. Lowe: The record will show that Dr. Teed joins in the offer.

The Court: Yes, that Dr. Teed joined in the offer of the exhibit.

(Whereupon, U. S. A. Exhibit No. 2 for identification was admitted in evidence.)

SAMUEL D. SMITH

called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

Q. Will you give us your name, please?

A. Samuel D. Smith.

(Testimony of Samuel D. Smith.)

Q. What is your occupation, Mr. Smith? [32]

A. I am a special agent of the Federal Bureau of Investigation.

Q. How long have you been a special agent?

A. Since March of 1940.

Q. You're presently stationed in Kansas City, Mr. Smith?

A. Yes, sir.

Q. Were you stationed at one time in Spokane?

A. I was.

Q. During the year 1944?

A. Yes, sir.

Q. Did you take part in the investigation of the George Clayton-Shirley Doores extortion case?

A. Yes, sir.

Q. As a matter of fact you were in charge of the investigation on behalf of the Federal Bureau of Investigation, is that so?

A. Yes, sir.

Q. Mr. Smith, were you present at a conversation between Shirley Doores and Mr. Connelly in Mr. Connelly's office in the Federal Building here in Spokane sometime during the spring of 1944?

A. I was.

Q. To your knowledge were you present with her in Mr. Connelly's office on more than one occasion?

A. Not after her arrest; I don't recall of any other occasion [33] except one time she requested to come over to see Mr. Connelly.

Q. After her arrest?

A. That's right.

Q. Then according to your recollection you were present with her in Mr. Connelly's office twice subsequent to her arrest in the spring of 1944?

(Testimony of Samuel D. Smith.)

A. I believe it was twice. I'm not sure about the second time. I'm positive I was there one time.

Q. That was prior to the trial of the criminal case? A. That's right.

Q. Mr. Smith, while you were so in Mr. Connelly's office in the presence of Miss Doores and Mr. Connelly was any conversation had in your presence between Miss Doores and Mr. Connelly and yourself relative to a sum of money on deposit in either the Old National or First National Bank in Spokane, in a deposit box rented by Shirley Doores?

A. She told Mr. Connelly that the money in question was in the Old National Bank in a lock box.

Q. Did she amplify that a little bit as far as the money in question was involved?

A. If I can recall exactly the words she said, she said, "Ed, the money is in the lock box in the Old National Bank, and I'll give them the key to get in the lock box. It's out at the house." Those are the words that I recall her [34] using.

Q. Did she at that time in Mr. Connelly's office, Mr. Smith, say whose money was in her box?

A. Not in Mr. Connelly's office.

Q. She did not make any statement as to Dr. Teed then?

A. Specific statement; she referred to it as "the money."

Q. As "the money"? A. That's right.

(Testimony of Samuel D. Smith.)

Q. Now, after the conversation was completed in Mr. Connelly's office where did you go then, Mr. Smith?

A. We went out to her home out here in the valley, I've forgotten the exact address.

Q. With Shirley?

A. That's right, Mr. Allbright, Mr. Anderson, Mr. Bezona, and myself.

Q. Now, who beside yourself and Miss Doores was present in Mr. Connelly's office in the conversation you just referred to?

A. I don't recall anyone.

Q. Just the three of you?

A. Just the three of us.

Q. After you went to Shirley Doores' home, where did you go then?

A. We went in her home. We had searched her home prior to that time looking for the key. She said, "There's no need [35] to look any further, I'll show you where the key is" and she gave us the key at that time to the lock box.

Q. Was she at any time out of your sight while she was in her home?

A. Not as I recall.

Q. You saw her take no narcotics?

A. No, sir. As a matter of fact, we had searched the house and taken all that we thought looked like morphine at the time before that.

Q. You knew that she had been a narcotic addict for many years?

A. Yes, sir.

Q. After you left her home where did you then go?

(Testimony of Samuel D. Smith.)

A. Came back to the Old National Bank.

Q. With Shirley Doores? A. Yes, sir.

Q. Now, what was done there, in your own words, Mr. Smith?

A. She had given us the key, and when we arrived and the box was pointed out as to number in the presence of Mr. Bezona, Mr. Anderson, Mr. Allbright and myself, she says, "Go ahead and open it."

Q. First, do you recall in whose name was that box?

A. I thought it was Velma or Vera Wilson; I forget the first name. I thought it was Velma, it might have been Vera; I know the last name was Wilson. The box was opened, the [36] gentleman at the bank who has charge of the lock boxes was present; there was a stack of money in the lock box. It was taken out, and underneath the money was an envelope which contained a deed to some property some place. That was looked at and put back in the box, then Mr. Bezona and the—I'm not sure about the gentleman at the bank, I believe Mr. McWilliams was his name, counted the money, and Mr. Bezona counted the money, and all of us was standing there watching the counting of the money being made.

Q. During that time or at the time the box was opened did Shirley Doores make any statement as to that money or the ownership of it?

A. She did.

(Testimony of Samuel D. Smith.)

Q. What did she say?

A. She said, "This is part of the \$14,000 I took from Dr. Teed." She referred to Dr. Teed as the sucker; she didn't use his name as such, Dr. Teed, but the "sucker."

Q. Did she mention the name Dr. Teed at all?

A. I later asked her if she meant Dr. Teed, and she said she meant Dr. Teed.

Q. Was the money counted at that time, Mr. Smith? A. Yes, sir, it was counted.

Q. How much was there? A. \$5,950.00.

Q. In what denominations?

A. As I recall there were some twenties, fifties, and hundreds, I think that's the way it was.

Q. Now, was any other statement made by Shirley Doores at the time in addition to what you have already stated concerning the ownership of this money?

A. Not right at that particular time. There was a statement she made to me later on, or just before——

Q. When was this?

A. It was later on, I'm sure.

Q. The same day?

A. Yes, it was the same day, about the times that she's make her deposits would be the days—I asked her if she went to the bank after each collection from Dr. Teed, and she said she did, and put the money in the deposit box, that she'd get. I don't know whether that was there at the

(Testimony of Samuel D. Smith.)

bank or back up here at the office or just where it was, but I recall it was that day.

Q. Now, back down at the safe deposit box, Mr. Smith, to whom was the \$5,950.00 turned over?

A. Mr. Bezona took possession of it.

Q. Who was present at the opening of that box? Were Detectives Allbright and Anderson there?

A. Yes, sir.

Q. Anyone else besides yourself and Bezona and Shirley? [38]

A. Mr. McWilliams, the officer of the bank, was there, maybe Ray Lamb, I think Ray was there, and maybe Luther Glass. Lamb and Glass were agents. Lamb and Glass, I'm not sure about their presence, I just can't, but I know they worked with me that day, but whether they were right there at the bank I don't know. I think Lamb was present, I'm pretty sure he was.

Mr. Freeman: You may inquire.

Cross-Examination

By Mr. Lowe:

Q. Just to complete the record, the Mr. Bezona to whom you then refer was then the United States Marshal for this district and is still the United States Marshal for this district?

A. Yes, sir.

Q. I wanted to make a record of that. In Mr. Connelly's office prior to the reference by Miss Doores or Mrs. Doores or whatever her name is

(Testimony of Samuel D. Smith.)

to the money being in the Old National Bank, I take it there had been some discussion of the money which had been taken from Dr. Teed?

A. I believe Mr. Connelly had asked her where the money was, and she said the money is in the Old National Bank. I can't remember the exact terms that was used.

Q. No, I understand, but the point I was trying to make that would clarify the court's mind was that the subject matter under discussion was money which this woman had gotten [39] from Dr. Teed, is that correct?

A. That's right, along with other matters, too.

Q. Yes, that's already in the record. I wanted to clarify that, Mr. Freeman. Well, you didn't ride over from the jail with the lady to Mr. Connelly's office, I take it, did you?

A. Sir, I've forgotten, I don't know whether I did or not.

Q. Well, anyway, did she in your presence at any time during the conversation with Mr. Connelly or on the way out to her house complain of being ill or not well and not herself?

A. No, sir.

Q. Did she appear to you to be in normal mental and physical condition?

A. Yes, sir.

Mr. Lowe: I believe that's all.

The Court: When Miss Doores went out to the house or when you took her out to her house she was in custody at that time, of course?

A. Yes, sir.

(Testimony of Samuel D. Smith.)

The Court: And was taken out of the jail for the purpose of getting the key to the safety deposit box?

A. The trip out to the house was, sir. She requested to come to talk to Mr. Connelly, and while there she requested to go out to the house and get the key, and he [40] instructed Mr. Bezona to take her to the house.

The Court: I assume, then, that somebody kept an eye on her while she was at the house?

A. Yes, sir.

The Court: Would it have been possible for her to take narcotics without being observed?

A. I don't think it could have been; I don't think we allowed her to go in the bathroom alone; I think Mr. Anderson stood right at the door.

The Court: Did she show any evidence of being under the influence of narcotics at the bank?

A. No, sir.

Redirect Examination

By Mr. Freeman:

Q. Where did she get the key?

A. It was in the pasteboard roller around which the toilet paper is wrapped, in the bathroom, you know those clamps that clamp at the end of the toilet paper roll, the key was in that.

Q. Did you observe that yourself?

A. I did, sir.

(Testimony of Samuel D. Smith.)

Recross-Examination

By Mr. Lowe:

Q. Mr. Smith, you referred to having searched the house looking for the key; did I understand you to say that? A. That's right.

Q. So you had known before this time she had a safe deposit [41] box? A. Yes, sir.

Q. Had she told you that, or did you learn by investigation?

A. We learned exactly the way it was registered by investigation; she did not tell us that.

Q. I thought there might have been some conversation with her prior to that time about having a box with money in it, before she came to Mr. Connelly's office.

A. There was some discussion about the one at the First National.

Q. If I may, with reference to the money in this box at the First National, that I believe was \$200.00? A. Yes, sir.

Q. Did you hear her make any statement as to where she had gotten that money, as distinguished from money in the Old National?

A. There was a statement made by her; it was in an envelope, and I think she gave us the key to that lock box without any argument at all. She said that money belongs to, I don't know whether she said "my father" or some relative. It could have been her father. It was a relative, I don't remember which.

Mr. Lowe: I think that's all.

Mr. Freeman: That's all.

(Whereupon, there being no further questions, the [42] witness was excused.)

HARRY C. ALLBRIGHT

called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

Q. Your name, please, sir?

A. Harry C. Allbright.

Q. I understand, Mr. Allbright, you're presently a retired city detective?

A. Yes, sir, last August.

Q. You were a detective employed in the Spokane Police Department in the years 1943 and 1944, were you not, Mr. Allbright? A. I was.

Q. Were you acquainted with Shirley Doores at that time, 1944? A. Yes.

Q. Mr. Allbright, were you present with Mr. Bezona, Mr. Smith, and several others at the opening of a safe deposit box in the name of Vera Wilson at the Old National Bank in Spokane in the spring of 1944? A. I was.

Q. Who else, to the best of your recollection, was also there, Mr. Allbright?

A. Anderson, Smith, Bezona, myself, and I believe Mr. McWilliams of the bank, as I recall. [43]

(Testimony of Harry C. Allbright.)

Q. Now just tell us in your own words, Mr. Allbright, what took place at the safe deposit box or the safe deposit vault of the bank when you were there. First, let's see if we can place that date a little more specifically. Can you recall approximately what month?

A. I think it was May 29.

Q. Of 1944? A. 1944.

Q. Yes; just tell us what transpired there that —was it morning, or afternoon?

A. I believe it was in the late morning. We had went into the bank, and the operator of the safety deposit boxes down there had taken the key, and he opened the box.

Q. Taken the key from whom, Mr. Allbright?

A. From Mr. Smith.

Q. From Mr. Smith?

A. Yes, and he opened the deposit box, and Mr. Smith, I believe, if I remember right, had him take the money out of the box, and at that time it was counted out in front of her and in front of the Marshal, and was later turned over to the Marshal and the Marshal re-counted it, and then he got himself a safety deposit box there at the bank and left the money in the bank.

Q. Do you recall how much was in the box?

A. \$5,950.00. [44]

Q. In what denominations?

A. As I remember, it was twenties, fifties and hundreds.

(Testimony of Harry C. Allbright.)

Q. Now, Mr. Allbright, at the time that money was taken from the box do you recall any statement made by Shirley Doores in your presence as to the source of that money?

A. She had been asked several times whose money it was, and she referred to Dr. Teed as "the sucker."

Q. As "the sucker"?

A. As who she got the money from.

Q. Was that the only occasion on that particular date on which you saw Shirley? I mean, you did not see her in Mr. Connelly's office?

A. No, I did not.

Q. Or did you go out to her home?

A. Yes, I was out at the home.

Q. Was she under your surveillance at all times while she was at the house?

A. Yes, she was under all of ours.

Q. Did she ever leave your surveillance?

A. No.

Q. Did you see her at any time or did she have opportunity at any time to take narcotics?

A. The only time she was out of my view was when she was in the bathroom, and Anderson was standing in the door at the time. [45]

Q. How long was she in the bathroom?

A. Oh, a couple of minutes, I suppose.

Q. For what purpose did she go in the bathroom?

A. On pretense of getting the key, which she did get out of the bathroom.

(Testimony of Harry C. Allbright.)

Q. In what mental state was she when you saw her at the house? Was she upset and nervous, or did she appear to be normal?

A. No, she seemed to be perfectly normal.

Q. Was that also true at the bank?

A. Yes.

Mr. Freeman: I think you may cross-examine.

Cross-Examination

By Mr. Lowe:

Q. I think there's nothing else except to clarify this matter of getting it from "the sucker." You were at that time discussing the money she had gotten from Dr. Teed? A. That's right.

Q. And what was said from which you understood that in going to the bank she was going to turn over the money that she had gotten from Dr. Teed? A. Yes.

Q. Well, what in substance was the conversation as you heard it? That's what I wanted to get at.

A. Well, all the way through she always mentioned the money as being Dr. Teed's money, but in most instances she [46] referred to him as "the sucker."

Mr. Lowe: I think that's all.

Examination by the Court

Q. But the conversation of the others with her and the whole transaction made it clear that "the

(Testimony of Harry C. Allbright.)

sucker" referred to Dr. Teed? A. Yes, sir.

Q. What jail was she in?

A. She was in the county jail—no, the city jail, a county prisoner, a federal prisoner.

Q. And you were a city detective, of course, then? A. Yes, sir.

Q. How long had she been in there, do you remember, at the time of this incident?

A. I think she had been in there two days at that time.

Q. And did she appear to be sick at that time?

A. No.

Q. Or under the influence of narcotics?

A. No.

The Court: That's all the questions I have.

(Whereupon, there being no further questions, the witness was excused.)

P. B. ANDERSON

called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

Q. Will you give your name, sir? [47]

A. P. B. Anderson.

Q. You are presently a retired detective of the Spokane Police Department? A. Yes, sir.

Q. Mr. Anderson, during the years 1943, 1944

(Testimony of P. B. Anderson.)

and 1945 you were a detective employed by the Spokane Police Department, is that correct?

A. Yes, sir.

Q. You knew Shirley Doores? A. Yes, sir.

Q. Mr. Anderson, during the latter part, I believe, of May of 1944 were you present at the Old National Bank with Shirley Doores?

A. I was.

Q. And Wayne Bezona, the United States Marshal, Mr. Smith, and Mr. Allbright?

A. Yes, sir.

Q. That was the morning of the 29th of May, is that your recollection?

A. Well, about that, I would say, yes, sir.

Q. It could have been, I take it, in the afternoon as well, is that right? A. Yes, sir.

Q. Of that particular day. Now, Mr. Anderson, in your own words tell us what transpired at the safe deposit box on [48] that particular afternoon or morning?

A. When Shirley finally did give us the key, Mrs. Doores give us the key, why, we all went to the Old National Bank.

Q. From her home?

A. Mr. McWilliams when we showed him the key, he knew right what box it was, of course; we went down and opened it and found the money.

Q. Now, in what denominations was the money in the box?

A. Twenty, fifty, and one hundred dollar bills.

(Testimony of P. B. Anderson.)

Q. And how much money was there?

A. \$5,950.00.

Q. Now, at the time the box was opened did Shirley make any statement in your presence as to the source of that money? A. Yes, she did.

Q. What did she say, Mr. Anderson?

A. She said, "This is some of the money."

Q. Did she indicate to you from whom she had obtained that money, specifically? A. Yes, sir.

Q. Who?

A. That she got it from Dr. Teed.

Q. She said she got it from Dr. Teed; now, before you went to the Old National Bank you were out to Shirley Doores' home, is that correct? [49]

A. Yes, sir.

Q. How long was she in her house there?

A. Oh, we were probably out there half an hour.

Q. Did you have her under your surveillance at all times? A. I did.

Q. Did she go in the bathroom?

A. Yes, sir.

Q. For what purpose, did she say?

A. Well, she said she wanted to go in the bathroom, and she would get the key for us.

Q. Did you watch her while she was in there?

A. I did; I stood with my foot in the door.

Q. How long was she in the bathroom?

A. Just a few minutes, and I asked her, "Hurry up and get the key," and she reached in the toilet paper roll and got it.

(Testimony of P. B. Anderson.)

Q. While you were in the house did she have any opportunity or did she take any narcotics?

A. Not that I know of; I don't believe she did.

Q. Was she normal, or appear normal?

A. She was normal as she ever was.

Q. How about at the bank?

A. She was normal.

Q. Would you say at either place she was under the influence of narcotics? A. No, I wouldn't.

Mr. Freeman: That's all.

Cross-Examination

By Mr. Lowe:

Q. To clarify, the subject of the discussion at Mr. Connelly's office and going to the bank was the actual money she had gotten from Dr. Teed, is that correct? A. Yes, sir.

Q. In other words, going back a little bit, I think the record shows it, you received a communication from the sheriff at Coeur d'Alene that Dr. Teed had been defrauded of a large sum of money by this woman, is that correct, or do you remember?

A. No, I think that——

Q. Well, anyway, you learned of it in some way, and picked her up in that connection, and the whole discussion was the money she got from Dr. Teed?

A. Yes, sir.

Mr. Lowe: That's all.

The Court: Were you in Mr. Connelly's office?

A. I can't say that I was for sure; I don't recall that.

(Testimony of P. B. Anderson.)

The Court: Mr. Connelly is deceased now?

A. Yes, sir.

The Court: And is no longer living. I think the record should show that, perhaps. I have no further questions.

(Whereupon, there being no further questions, the [51] witness was excused.)

MRS. JEAN SHEEHY

called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

Q. Your name, please? A. Jean Sheehy.

Q. Mrs. Sheehy, where do you reside?

A. Where do I live?

Q. Yes.

A. I live at Martinsdale, Montana.

Q. Are you related to Shirley Doores?

A. I am; I'm her sister.

Q. How long have you lived at Martinsdale, Montana, Mrs. Sheehy?

A. Well, I've been there since the fall of '39.

Q. Since the fall of 1939? A. Yes.

Q. Mrs. Sheehy, I understand that your father, who would also be the father of Shirley Doores, lived with you sometime in the forties, is that correct?

A. Well, I couldn't exactly say the correct date

(Testimony of Mrs. Jean Sheehy.)

now, I just don't remember, but I'm sure it was 1941.

Q. 1941 when he came to live with you?

A. Yes.

Q. You are married? [52] A. Yes.

Q. He came to live with you and your husband, is that correct? A. That's right.

Q. For how many years after he came to live with you in 1941 did he live with you?

A. Well, up until his death in July of last year.

Q. Now, Mrs. Sheehy, when your father came to live with you in 1941 where did he come from?

A. Well, he had been living in Wyoming with my oldest brother, which is dead too now.

Q. Now, are you acquainted or were you acquainted in 1941 with his financial status?

A. No, I really wasn't.

Q. Well, did you know whether or not, of your own mind, he was receiving an old age pension in 1941?

A. Well, he was receiving the old age pension.

Q. In 1941?

A. What year he got it I couldn't tell you. He wasn't with me at that time.

Q. Beg your pardon?

A. He wasn't with me at the time he began to get the old age pension.

Q. Do you know of your own knowledge how many years he was receiving old age pension?

A. Well, I really couldn't tell you, because I

(Testimony of Mrs. Jean Sheehy.)

don't know [53] what time he started getting it, you see.

The Court: Was he receiving it at the time he lived with you?

A. Well, only for a few years. They cut him off after he come to live with me.

Q. But he did get it for several years after 1941?

A. Yes.

Q. As a matter of fact, the old age pension amounted to approximately \$12.00 a month, is that correct?

A. Well, that's what he was getting when he come to live with me, and they gradually raised it.

Q. As a matter of fact they increased it until it reached the sum of \$34.00 a month, is that correct?

A. Right around that, around \$32.00 or \$34.00; I'm sure it was \$34.00.

Q. On or about the year 1945?

A. Well, I imagine that's when they cut him off, right in there. I couldn't say for sure the dates.

Q. But to the best of your recollection he was getting an old age pension from approximately the year 1941 to 1945?

A. That's right.

Q. In varying amount?

A. Yes.

Q. How long did you say he lived with you from 1941? He lived with you until his death? [54]

A. Up until his death.

Q. Did he work?

A. Well, he worked off and on.

Q. What kind of work did he do?

(Testimony of Mrs. Jean Sheehy.)

A. Well, he did ranch work, and he was quite a cattle man, he looked after cattle and just odd jobs like that.

Q. He was not steadily employed during that period? A. Well, no, he really wasn't.

Q. As a matter of fact during that period did you find it necessary to contribute to his support?

A. I helped him very much.

Q. Now, were you acquainted or are you acquainted with his property holdings, if any, during the years 1941 to 1948 at the time of his death?

A. No.

Q. Do you know whether or not he had any property? A. Not to my knowledge.

Q. He had no property to your knowledge?

A. No, he always, as far as I knew—of course, our home was split up when we were quite young, and there was quite a few years that we weren't with him, and as far as I can remember he always leased his ranches, and——

Q. Leased his ranches? A. Yes.

Q. You mean he leased his ranches to others, or leased from [55] others?

A. Leased from others.

Q. He owned no real property, real estate?

A. Not to my knowledge.

Q. And did he leave any estate on his death in 1948? A. No, he did not.

Q. During the time that he was living with you, and specifically on or about the year 1945, did you

(Testimony of Mrs. Jean Sheehy.)

or your husband pay hospital bills for the care of your father? A. Yes, we did.

Q. Substantial amounts? A. Yes.

Q. At that time I take it then he did not have sufficient money to pay those bills himself?

A. No.

Q. To your knowledge? A. No.

Q. Now, during the period he lived with you, from 1941 to 1948, did you ever know him to have any large sum of money?

A. Not to my knowledge.

Q. Did you ever know of his giving any sum of money to Shirley Doores?

A. Not to my knowledge. If he gave it to Shirley it's beyond me, I don't know a thing about it.

Mr. Freeman: I think you may inquire. [56]

Cross-Examination

By Mr. Lowe:

Q. One other question; during the time he was receiving this old age pension and was living with you did he turn that money over to you?

A. Well, not exactly; he left it at the house, and when he'd need medicine or something that he would need, why, if he didn't have it on him in person, I would give him what he needed.

Q. In other words, it was not put away and kept any place? A. No.

Q. It was used for his expenses and your own expense, is that what you mean?

(Testimony of Mrs. Jean Sheehy.)

A. That's right.

Q. And as it came in it was all expended?

A. Yes.

Q. He didn't save any of it?

A. He couldn't have saved much of that; he wasn't getting enough.

Q. Not getting enough to save anything, was he? That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Freeman: I think, if your Honor pleases, that completes our case as far as the petition of Shirley Doores is concerned. You have no further evidence, I take it? [57]

Mr. Lowe: No, we have no further evidence; we're submitting Dr. Teed's petition on the same testimony.

The Court: Let's see, I wasn't present at the trial; you might state just briefly what his testimony was. You're submitting that on the record, are you not?

Mr. Lowe: Well, I believe Mr. Freeman covered it on his opening statement. He was thoroughly examined, cross-examined, reexamined and recross-examined. There were two lawyers representing each defendant, and each lawyer gave him a real going over.

The Court: One thing that occurred to me; did he testify the money given by him to Shirley Doores

was in the denominations found in the safe deposit box?

Mr. Lowe: Substantially; he kept no record of it.

The Court: I wondered if he did testify he gave her some fifties and some hundreds and some twenties?

Mr. Lowe: Yes, that question was asked him in the record. It was different payments in cash money. All the payment was in currency.

The Court: Well, I think perhaps for the guidance of counsel it seems to me very clear here the evidence is overwhelming that the money found in the safe deposit box at the Old National Bank building, the \$5,950.00, was money that Miss Doores had procured from Dr. Teed, so the court will find that to be the fact, and the controversy [58] from here on—that is, you can assume that in your conduct of the case from here on, and I assume now the question will be one of law as to whether Dr. Teed is entitled to have the money paid to him, or it should remain in the registry of the court.

Mr. Lowe: That's correct. As I said at the opening, there's no question between the government and Dr. Teed. Does your Honor desire to hear oral argument? We have a rather extended argument. Do you want to open?

Mr. Freeman: No, you may open.

Mr. Lowe: Would you prefer it be submitted on briefs? There are some questions of law that as I say, will take some time to present our views.

The Court: Well, if it's seriously contested, and I assume it is, and there are authorities to be presented, it would probably not be practicable for me to try to absorb them and give a decision off the bench. I think it might be helpful if you will summarize your position and not go into the authorities, and submit briefs or authorities on the points you wish to emphasize.

Mr. Lowe: Shall I be very brief?

The Court: Yes, if that's acceptable to you.

Mr. Freeman: Yes, your Honor; I take it it will not take over five or ten minutes to present?

Mr. Lowe: No. [59]

Mr. Freeman: Would your Honor permit a five or ten minute recess at this time? I have possibly very short testimony in defense of Dr. Teed's—I have in mind perhaps calling Dr. Teed for a question or two; I'd like a five minute recess if that's possible.

The Court: May I suggest this, then; I have some other matters coming on that shouldn't take very much time at 1:30; suppose we recess this case until 2 o'clock and then come back, or would you prefer to finish it this forenoon?

Mr. Lowe: I think I know what Mr. Freeman has in mind; it won't take five minutes.

The Court: All right, the court will recess for five minutes.

(Short recess.)

The Court: All right, you may proceed.

Mr. Freeman: If your Honor please, I'd like to call Dr. Teed to the stand.

EDWARD H. TEED

called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

Q. Dr. Teed, you are the petitioner in this cause?

A. Yes, sir.

Q. Seeking the return of \$5,950.00?

A. Yes, sir. [60]

Q. Secured from you by Shirley Doores?

A. Yes, sir.

Q. —and Clayton and others. Dr. Teed, were you subsequently charged with a felony in the courts of Idaho? A. Yes, sir.

Mr. Lowe: We object to that as not material.

The Court: I fail to see the materiality of it. It's preliminary, I presume.

Mr. Freeman: Your Honor, it's this; it's not for the purpose of affecting his credibility, because obviously he had not been convicted at the time of his testimony reported here, but the materiality as I see it is this: I think we should be permitted to show, if such is the case, that he was ultimately convicted in the court of Idaho on a charge arising out of, if such be the case, of the unlawful disposition of narcotics to Shirley Doores, part of this transaction.

(Testimony of Edward H. Teed.)

The Court: Well, go ahead; I'll overrule the objection, since the case is before the court, and decide what to do with it after it comes in.

Mr. Freeman: Will you read that question?

(Whereupon, the reporter read the last previous question.)

Q. Let's put it, were you subsequently convicted of a felony in the courts of Idaho? [61]

A. Yes.

Q. What was the charge, Dr. Teed?

A. Violation of the narcotics law.

Q. Did that entail the specific transaction in narcotics that you had in this particular matter with Shirley Doores?

A. Yes.

Mr. Lowe: Object to that as not material.

The Court: Yes, the record may show the attorney for Dr. Teed objects to all of this line of questioning, and it will be overruled.

Q. And the answer was it did arise?

A. Yes.

Q. And you were subsequently convicted of that charge?

The Court: You say the courts of Idaho; I presume you mean the——

Mr. Freeman: Superior Courts of Idaho, the state courts of Idaho.

The Court: That was a violation of the state law over there?

Mr. Freeman: Yes. That's all.

(Whereupon, there being no further questions, the witness was excused.)

WAYNE BEZONA

called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

By Mr. Freeman:

Q. Your name is Wayne Bezona? [62]

A. Yes, sir.

Q. You're the United States Marshal for this district? A. That's right.

Q. You were also United States Marshal for this district during the entire year of 1944, Mr. Bezona? A. I was.

Q. Mr. Bezona, were you present at the Old National Bank on or about the 29th day of May, 1944, when the sum of \$5,950.00 was taken from the safe deposit box of Shirley Doores, under the name of Vera Wilson? A. I was.

Q. Now, Marshal, at the time you were present at the box did you have in your possession a search warrant? A. I did have, all the time.

Q. You did have in your possession a search warrant? A. Yes.

Q. A search warrant for this particular sum of money?

A. For everything that pertained to the case, including money, narcotics, and a key at the house. We had a search warrant for the property at the

(Testimony of Wayne Bezona.)

house and the bank, and it was all done on the same raid.

Q. And issued out of this court?

A. That's right.

Q. And were you acting by virtue of that warrant at the time? A. Entirely. [63]

Q. And to whom, if you recall, was that search warrant directed?

A. It was directed to me as Marshal.

Q. To you as Marshal? A. Yes, sir.

Q. Did it contain any particular place, or was it directed to any particular bank?

A. Yes, it did.

Q. It named the Old National Bank?

A. It particularly described the place to be searched and the thing to be searched at the bank and at the property.

Q. And among the places so described the Old National Bank was detailed? A. That's right.

Q. And you received that morning the sum of \$5,950.00? A. At the bank, yes, one bank.

Q. By virtue of your search warrant as well as Shirley Doores turning the money over to you; and you received that as an officer of this court?

A. Yes; she turned the key over to us at her home, and we proceeded to the bank with the key and with her, and there unlocked the safety box, and I counted the money each and every time it was counted, because I was taking it under that warrant.

(Testimony of Wayne Bezona.)

Q. What was done by you with that money? [64]

A. The money was held by me; I immediately rented a safety deposit box and kept the money in there for I don't know how long, some considerable time, for a year or over, and finally I wanted to get it out of my custody and I turned it over to the clerk of the court.

Q. Under order of the court?

A. Under order of the court, and got relieved of having to hold it further, and that's where this money is.

Q. By order of the court you were directed to deposit it in the registry of the court?

A. I think that's correct.

Mr. Freeman: I think that's all.

Mr. Lowe: I have no questions.

(Whereupon, there being no further questions, the witness was excused.)

The Court: Is that all the testimony, then?

Mr. Freeman: I think so. I don't think there's any question but what Mr. LaFramboise is presently holding the money in the registry of the court. There's no question as far as that's concerned?

Mr. Lowe: Not so far as we're concerned; we hope he is.

The Court: I believe it was done on an order, wasn't it?

Mr. Freeman: Yes, depositing it in the registry of the court.

The Court: Agreed by all concerned, then, that it is in the registry of the court.

Mr. Freeman: Yes. That is all, then, if your Honor please.

The Court: I think rather than call on Mr. Lowe here, the court is convinced that this money was Dr. Teed's money. Now, what is your position as to why it shouldn't be turned back to him, just very briefly, then I'll ask for written briefs afterward.

Mr. Freeman: Your Honor please, by virtue of authority which we will submit to your Honor, it is the position of the government that this money having been used to perpetrate a crime, one of two crimes, either the bribery of a federal officer or an attempt to bribe a federal officer, and that the money having been so used for that purpose, it is considered to be considered as fruit of the crime, and under the citations which we will give to your Honor the person who has so paid out that money under the fact it has become the fruit of the crime has no right to its return. In substance, although actually the money did not find its way into the pockets of a federal officer, he paid it to Shirley Doores and to Kelley with the idea that a specific federal officer, W. G. Graben as well as Mr. Bangs in the inspector's [66] office, the narcotics office in Seattle, would be the recipients of that money, and certainly whether he was tried or not he was guilty on his own admissions in the record of an attempt to bribe a federal officer, and being so, the money

becomes fruit of the crime, the return of which he is not entitled to.

The Court: Just a moment; on the \$200.00 part of it, is there any evidence that was the fruit of any crime?

Mr. Freeman: As a matter of fact, your Honor, we cannot dispute Miss Doore's assertion that money came from her father.

The Court: That's what I thought. I don't know where it came from; it seems to me the government having taken it, they have the burden of showing it was the fruit of the crime. Since it was taken from her I think it should be returned to her, on the state of the record here.

Mr. Freeman: Yes.

The Court: All right. Briefly do you wish to state your position?

Mr. O'Kelly: Yes, I think we can very briefly state it. These cases on bribery and attempted bribery I think are completely irrelevant, because there was no federal officer ever approached or no attempt to approach any federal officer, nor was there any intent on the part [67] of Miss Doores or any of these people in the conspiracy with her to ever reach a federal officer. The entire act was carried to its complete conclusion; there was no stopping in the middle of anything; there was no bribery, clearly, and no attempt to bribe, and in addition, the fact Mr. Freeman prior to this argument mentioned this matter of *pari delicto*, I think probably when the briefs are turned in he'll make

more of it than he did just now; actually that is not applicable in this case, because Dr. Teed's actions were all under duress and threat of prosecution, and therefore he's not responsible for them as if he had been part of this conspiracy formed by Miss Doores, and our contention is that since his actions were all performed under duress and under threat of prosecution that his actions were not his own actions, and therefore the money remained his and is not subject to being confiscated by the government.

The Court: Well, I think it would be helpful to have briefs in this case. I doubt that I could digest the authorities even with extended argument without taking it under advisement anyway. I'll be in Yakima during most of the month of November, so there isn't very much urgency about this matter. Would three weeks on a side be enough for you getting out the briefs?

Mr. Lowe: Yes. [68]

Mr. O'Kelley: What will be the order of the briefs?

The Court: I rather think that the government should open. I have indicated here that it's my conclusion, I think there couldn't be any question about that under the evidence, that the money found in the safe deposit box came from Dr. Teed and would be his money unless he's precluded from recovering it by some law or principle of law that is urged by the government, so it seems to me that the logical place for the affirmative would be with the government.

Mr. Freeman: Then the government, your Honor, would also be entitled if it desires to a reply brief?

The Court: Yes. We'll say fifteen days on a side, and then you can have ten days for a reply brief. That will still be within the time I'll be in Yakima.

Mr. Freeman: And your Honor, just one more question, does your Honor desire a full-fledged brief, or just a citation of authorities?

The Court: Well, it's principally for the assistance of the court, of course, and I don't believe that elaborate arguments on the facts are very helpful. I think you should state what your points are and then cite the authorities in support of them, and it isn't necessary to set out extended quotes from cases, because I'll probably examine them anyway. Unless they're too numerous [69] or you cite too many of them on some point I usually examine the cases anyway. Of course, if you wish to set out short quotations to emphasize some point that's all right. For the most part a clear statement of your points and then a citation of the authorities, will be sufficient.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That I am the regularly appointed, qualified and acting

official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on October 14, 1949, at Spokane, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had on such date in the cause of United States of America vs. Shirley Doores, Defendant, and Edward H. Teed, Intervener.

Dated this 20th day of May, 1950.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed May 22, 1950.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the original—

1. Motion of Shirley Doores for release of money.
2. Stipulation re deposition of Shirley Doores.
3. Motion to Intervene—Edward H. Teed.
4. Order Allowing Motion to Intervene.
5. Petition in Intervention.
6. Acceptance of Service of Motion, Notice, and Petition in Intervention by Allan Pomeroy, Attorney for Shirley Doores.
7. Court Reporter's Record of Proceedings at the hearing on petition for release of funds.
8. Exhibit.

United States Exhibit "2." Printed Transcript of Record on Appeal in two volumes in Case No. 10972, George Clayton, Appellant, vs. United States of America, Appellee, in the United States Court of Appeals for the Ninth Circuit. (Original Exhibits in 10972 admitted in evidence as a portion of United States Exhibit "2," not forwarded with this record for the reason that they are already included in the printed record at Pages 37 to 89 inclusive.)

9. Opinion of the Court—letter dated 1/12/50.
10. Findings of Fact and Conclusions of Law.
11. Judgment for Intervenor.
12. Notice of Appeal.
13. Statement of Points Relied Upon on Appeal.
14. Designation of portion of record to constitute Record on Appeal.

on file in the above-entitled cause, and that the same

constitutes the record for hearing of the Appeal from the Judgment of the United States District Court for the Eastern District of Washington in the United States Court of Appeals for the Ninth Circuit as called for by the Appellant in his Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 23d day of May, 1950.

[Seal] A. A. LaFRAMBOISE,
Clerk of said District Court.

By /s/ EVA M. HARDIN,
Deputy Clerk.

[Endorsed]: No. 12556. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Edward H. Teed, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed May 26, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12556

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

SHIRLEY DOORES, et al,

Defendant,

EDWARD H. TEED,

Intervenor and Cross-Petitioner-Appellee.

DESIGNATION OF POINTS AND REQUEST
FOR PRINTING OF RECORD

I.

Appellant hereby adopts and designates for consideration in this appeal in lieu of a separate statement the designation of points on which it intends to rely heretofore designated by appellant and filed in the District Court.

II.

Appellant deems consideration by the Court of all of that record, certified to this Court by the Clerk of the District Court, necessary to this appeal to a proper understanding of the questions presented and hereby requests that the same be

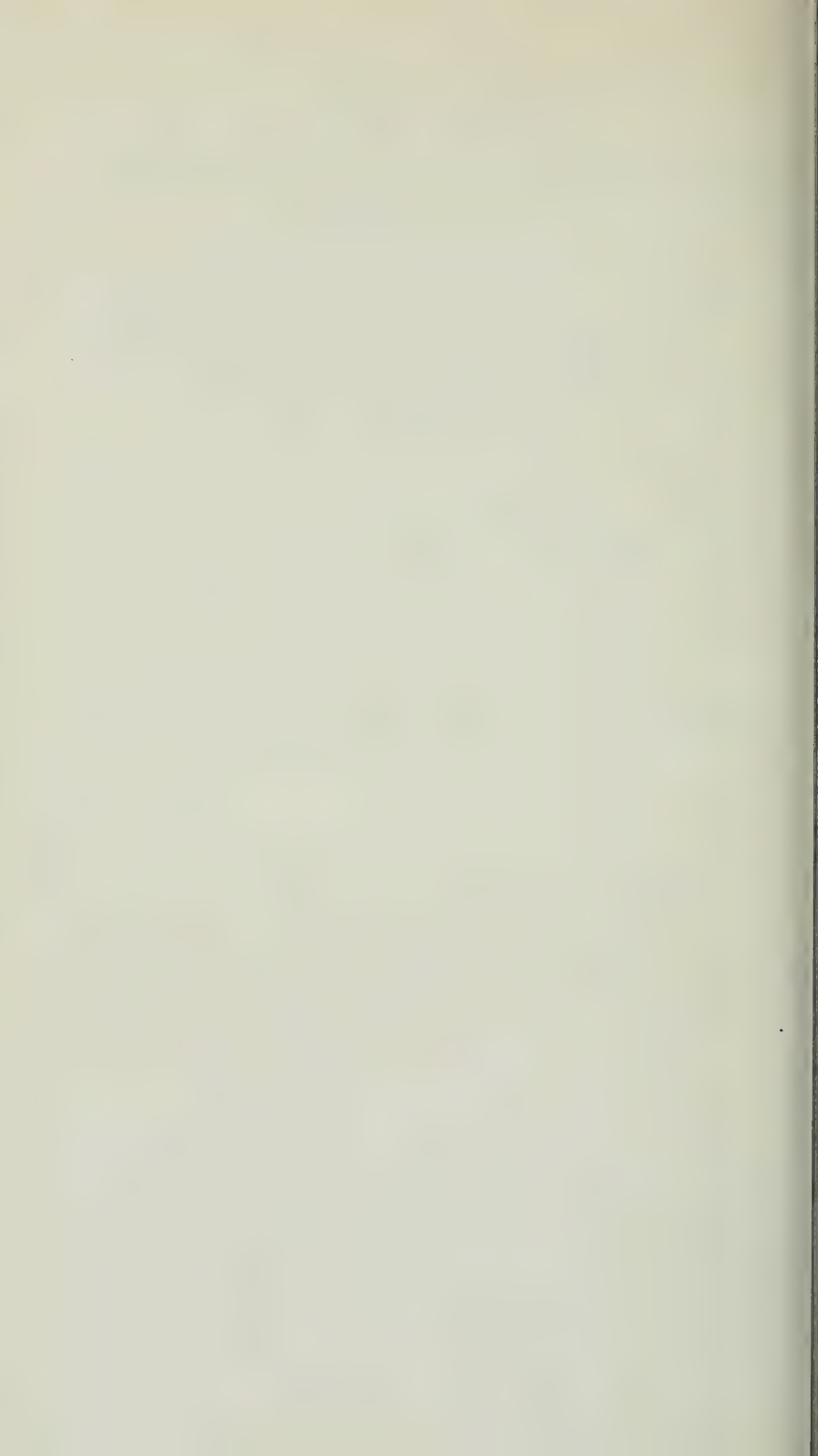
printed, excepting and omitting formal parts of the pleadings and other court papers.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed June 2, 1950.



No. 12556

IN THE

United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.

SHIRLEY DOORES, et al,
Defendant,

EDWARD H. TEED,
*Intervenor and Cross-
Petitioner-Appellee.*

No. 12556

*On Appeal from the District Court of the United
States, for the Eastern District of Washington*

BRIEF FOR THE APPELLANT

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN,
Assistant United States Attorney
Attorneys for Plaintiff-Appellant

FILED

DEC 7 1950

CL. P. O'BRIEN,
CLERK

INDEX

	Page
Statement of Jurisdiction.....	1
Statement of the Case.....	2
Statement of Facts.....	2
Questions Presented.....	5
Statutes Involved.....	7
Designation of Points to be Urged.....	7
Summary of Argument.....	8
Argument	
Pari Delicto.....	9
Crime Against the Government.....	12
Past Punishment.....	15
Conclusion.....	16

TABLE OF CASES

<i>Armitage v. Hogan</i> , 25 Wash. (2d) 672, 171 Pac. (2d) 830.....	12
<i>Clark v. United States</i> , 102 U. S. 322 at page 331.....	11
<i>Marshall v. Lovell</i> , 19 F. (2d) 751, c. d. 276 U. S. 616.....	14
<i>Miller v. Myers</i> , 158 Wash. 643, 291 Pac. 1115.....	12
<i>Second Russian Insurance Company v. Miller</i> , 268 U. S. 552.....	14
<i>United States v. Connoughton</i> , 39 F. (2d) 237.....	11
<i>United States v. Galbreath</i> , 8 F. (2d) 360.....	13, 14
<i>United States v. Thomas</i> , 75 F. (2d) 369.....	11

MISC.

12 Am. Juris 213, pages 725, 726, 727.....	11
Bouvier's Law Dictionary, page 2454.....	10

STATUTES

28 U.S.C.A. Sec. 851.....	5, 7, 8
28 U.S.C.A. Sec. 852.....	1, 7
28 U.S.C. (Rev.) Sec. 1291.....	1
28 U.S.C. (Rev.) Sec. 2041.....	6, 7, 8, 17
28 U.S.C. (Rev.) Sec. 2042.....	1, 5, 6, 7, 17

No. 12556

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	}	No. 12556
<i>Plaintiff-Appellant,</i>		
<i>vs.</i>		
SHIRLEY DOORES, et al,		
<i>Defendant,</i>		
EDWARD H. TEED,	}	
<i>Intervenor and Cross-Petitioner-Appellee.</i>		

On Appeal from the District Court of the United States, for the Eastern District of Washington

BRIEF FOR THE APPELLANT

STATEMENT OF JURISDICTION

This action was brought in the District Court of the United States for the Eastern District of Washington, Northern Division, pursuant to the provisions of Sec. 852 of Title 28, U. S. C. A., now Sec. 2042 in Revision. Judgment was entered on the 21st day of February, 1950 (Tr. 16, 17) and Notice of Appeal was filed on April 19, 1950, (Tr. 17, 18). This Court has jurisdiction under Sec. 1291 of the revised Title 28, U. S. C.

STATEMENT OF THE CASE

On or about September 1, 1949, Edward H. Teed, intervenor and cross-petitioner-appellee herein, filed a petition in intervention to recover the sum of \$5,950 held in the registry of the District Court for the Eastern District of Washington. The petition was heard by the Hon. Sam M. Driver, Judge of the above District Court, on or about October 14, 1949, without a jury. Judgment was entered on or about the 21st day of February, 1950, directing the Clerk of Court to pay to Edward H. Teed, the appellee, the said sum of \$5,950.

STATEMENT OF FACTS

On or about December 12, 1944, in the District Court for the Eastern District of Washington, Shirley Doores, George Clayton and Edward Kelly were duly convicted of conspiring to extort money from Dr. Edward H. Teed, the appellee herein. The evidence upon which Shirley Doores and the others were convicted was essentially as follows:

Dr. Edward H. Teed, in 1944, was a practicing physician at Coeur d'Alene, Idaho. Shirley Doores had on a number of occasions secured narcotic drugs from Dr. Teed for a fictitious individual by the name of Mike Sanders. She had also procured narcotics prescriptions for herself, although she was known by the doctor to be an addict. Shirley Doores, Clayton and Kelly decided to take advantage of the unlawful issue of narcotics prescriptions. It was agreed by the three of them that Kelly would pose as one W. J. Graben, a Federal Narcotic Officer, stationed at Seattle. It was part of the general plan that, posing as such narcotic officer, Kelly would journey to Coeur d'Alene and

advise Dr. Teed that he was checking on the prescriptions issued to Mike Sanders.

On or about April 10, 1944, Shirley Doores and Kelly went to Coeur d'Alene. Shirley went to Dr. Teed's office. After about ten minutes' delay, Kelly followed her there. In Shirley Doore's presence Kelly made known to Dr. Teed that he was W. J. Graben and that he was investigating the sale of narcotics to Sanders. Kelly also advised Dr. Teed that he had a warrant for the doctor's arrest in his pocket but said he would not serve it until the following day. He also waved what purported to be his credentials in the direction of the doctor.

After Kelly left the doctor's office, Shirley Doores returned and stated to Dr. Teed that she had spoken to Graben and that Graben could be "fixed" for \$2,500. That same day Dr. Teed paid that sum to Shirley Doores.

On April 17, 1944, Shirley Doores again contacted Dr. Teed and demanded \$1,500, which she said was necessary to pay another Federal narcotic officer and the clerk in the narcotic office. She also demanded a quantity of narcotics. At that time Dr. Teed paid her the \$1,500 and gave her 100 tablets of morphine, 50 grains of codein and 100 tablets of dilaudid, as requested.

On April 12, 1944, she again reappeared in Dr. Teed's office in Coeur d'Alene and demanded \$3,500 more to pay off some of the other Federal narcotic officers. Dr. Teed paid her this amount. She suggested to Dr. Teed at this time that he leave town for at least several days to permit conditions to quiet down. As a result of this suggestion, Dr. Teed spent some time at Hailey, Idaho, purportedly on a vacation trip, from

whence he was again called back to Coeur d'Alene by Shirley Doores.

On April 20, 1944, as a result of a telegram received by him at Hailey, Idaho, Dr. Teed returned to Coeur d'Alene. Shirley Doores advised him by phone that very serious complications had arisen and that, if these matters were not straightened out before April 22, he might be arrested. Teed immediately drove to Spokane, where he saw Shirley Doores personally concerning the matters discussed over the phone. In his presence, Shirley made what purported to be a long distance call to Graben at Seattle and after the call was completed she advised Teed that an additional \$6,500 was required to hush a Mr. Bangs, Chief Narcotic Inspector at Seattle, along with a large quantity of narcotics for Graben. That evening Dr. Teed paid Shirley \$3,000 in cash. The balance of \$3,500, plus the narcotics, was given to Shirley on April 24.

The conspirators' downfall came about as a result of the greediness of Shirley Doores and her refusal to divide any of her ill-gotten gains with the other conspirators. She informed Kelly that she had only received \$600 from Dr. Teed, when in truth and fact she received over \$14,000. Kelly became suspicious and went directly to Dr. Teed's office at Coeur d'Alene and, still posing as Graben, demanded additional sums of money from Dr. Teed. Dr. Teed, realizing that Shirley had not used the \$14,000 he had given her for the bribing of Graben and Bangs, immediately called the police and all the conspirators were arrested.

At the time of the arrest of the conspirators a search warrant was procured by the United States Attorney directed against the safe deposit box of Shirley Doores in The Old National Bank of Spokane. As a result of the issuance of this warrant the sum of \$5,950 in

currency was found by the United States Marshal in that deposit box. A list of the serial numbers of this currency, which was in \$10, \$20 and \$50 bills, was admitted in evidence at the criminal trial as being a portion of the monies extorted from Dr. Teed.

On or about the 12th day of September, 1946, the District Court for the Eastern District of Washington duly and regularly entered an order directing the United States Marshal to deposit said sum of \$5,950 into the registry of the Court under Title 28, U.S.C.A., Sec. 851. The money was so deposited by the Marshal.

It should also be pointed out that Dr. Edward H. Teed was thereafter convicted of a narcotics violation in the State Court of Idaho, such violation consisting of the unlawful sale of narcotics to Shirley Doores and the fictitious prescriptions to Mike Sanders.

On or about the 1st day of September, 1949, Dr. Teed petitioned for the return of the \$5,950 in the registry of the Court on the basis that said sum was the property of the petitioner and procured from him by Shirley Doores by means of "threats, duress, fraud, extortion, and blackmail" and that he was entitled to the return of said monies under Title 28, U. S. C., Sec. 2042.

The judgment entered on the 21st day of February, 1950, by the Hon. Sam M. Driver, District Judge for the Eastern District of Washington, held that the said Edward H. Teed was entitled to the return of said sum of \$5,950. It is from this judgment that this present appeal is taken.

QUESTIONS PRESENTED

1. Whether the Court was justified from the evidence in this case in making Finding of Fact No. 4 (Tr. 15), which was as follows:

“That Edward H. Teed, who paid the money, and Shirley Doores, who received it, are not in *pari delicto* and Edward H. Teed had no intention of bribing or attempting to bribe a Federal narcotics agent until he was coerced and deceived by Shirley Doores, as stated above.”

2. Whether the Court was justified from the evidence in this case in making Finding of Fact No. 6 (Tr. 15), which was as follows:

“That Edward H. Teed has been convicted and punished for violation of the Idaho State Narcotics Laws for his conduct in connection with this transaction. His punishment has been severe since he has been deprived of his right to practice his profession as physician, and the withholding of Edward H. Teed’s money from him would in practical effect amount to an additional fine of \$5,950 for his six-year old transgressions.”

3. Whether the Court was justified from the evidence in this case in making Conclusion of Law No. 1 (Tr. 15), which was as follows:

“That Edward H. Teed, the cross-petitioner herein, is the legal owner of and is entitled to the possession of said sum of \$5,950 held in the registry of the court.”

4. Whether the Court was justified from the evidence in this case in making Conclusion of Law No. 2 (Tr. 15), which was as follows:

“That under Sections 2041 and 2042 of Title 28, U. S. C., the cross-petitioner, Edward H. Teed, is entitled to withdraw from the registry of the court the said sum of \$5,950.”

5. Whether the Court was justified from the evidence in this case in making Conclusion of Law No. 3 (Tr. 16), which was as follows:

“That neither public policy nor the equities of the case require the withholding of the said sum of \$5,950 from Edward H. Teed, cross-petitioner.”

6. Whether the Court was justified from the evidence in this case in making Conclusion of Law No. 4 (Tr. 16), which was as follows:

“That the petition of cross-petitioner, Edward H. Teed, must be granted.”

7. Whether or not the Court erred in making its judgment ordering and directing the return to Edward H. Teed, as intervenor and cross-petitioner-appellee, the sum of \$5,950 now held in the registry of the Court.

STATUTES INVOLVED

The Statutes involved in this case are 2041 and 2042, Title 28, United States Code, formerly sections 851 and 852 of Title 28, U. S. C. A., and are set forth in the Appendix.

DESIGNATION OF POINTS TO BE URGED

1. Appellant respectfully urges that there was no evidence to support the trial court's finding of fact that appellee and Shirley Doores were not in a *pari delicto* relationship each to the other.

2. Appellant respectfully urges that the trial court was in error in determining as a matter of law that appellee was entitled to the return of said monies where the crime of attempted bribery has been committed against the Government and said monies seized by the Government as evidence of that unlawful purpose.

3. Appellant respectfully urges that the Court was in error in considering the amount or extent of past punishment in determining whether or not appellee was entitled to the return of the monies here involved.

SUMMARY OF ARGUMENT

The appellee, Dr. Teed, to avoid apprehension and arrest for the unlawful sale of narcotics, paid the sum of \$5,950 to one Shirley Doores with the intent and purpose that said money be used by her to bribe Federal narcotic officers. The money was appropriated by Shirley Doores for her own use. It was seized from her possession by a United States Marshal, acting under a lawfully procured search warrant, as evidence in an extortion charge against Shirley Doores and others in the Federal District Court and deposited by the Marshal in the registry of the court under Section 851 of Title 28, U. S. C. A., now Section 2041, Title 28, U. S. C.

It is the position of the appellant that, from the above resume of facts, it is apparent that both appellee and Shirley Doores were in the relationship of *pari delicto*. It is the further position of appellant that there is no evidence in this cause upon which the Judge, as a trier of fact, could have found that such relationship did not exist.

It is the further position of this appellant that where money has been so paid on an illegal agreement, a *malum in se* agreement, and the relationship of *pari delicto* exists, the law will assist neither of them in recovering money so paid, whether it be from each other or from the United States Government which is in legal possession of such tainted funds and against which the crime was committed; that as a matter of public policy the law will leave the parties to such transaction as it found them and give neither aid nor comfort to either of them.

It is the further contention of the appellant that the fact that appellee has already been subjected to punishment for his crime should not be considered by the

Court as a basis for the return of the monies here involved.

ARGUMENT

It should be pointed out for the assistance of this Court that the present appeal is a civil matter arising out of a criminal case. The entire transcript of record in the criminal case, by agreement of counsel for both appellant and appellee, was admitted by the Court as an exhibit (Tr. 36). That transcript is designated herein as Exhibit 2 and appellant in the course of this argument will refer to portions thereof and in particular to the testimony of Dr. Teed, appellee, as contained therein.

Pari Delicto

As heretofore stated, it is appellant's contention that the trial court was in error in determining as a finding of fact that the appellee and Shirley Doores were not in the relationship of *pari delicto* to each other. It is the further contention of this appellant that there is no evidence from which the trial court could have determined as a finding of fact that such relationship did not exist.

The appellee, Dr. Teed, testified as a witness for the Government in the criminal conspiracy case against Shirley Doores and others in which he was the victim. His testimony in the previous criminal case is submitted by the Government as proof that there is no evidence in the instant case upon which the trial court could find as a finding of fact that the relationship of *pari delicto* did not exist between the appellee and Shirley Doores. The appellee admitted that he knew that there was a Federal narcotic agent in Seattle by the name of "Graven" or "Graben" (Ex. 2, p. 239).

Appellee admitted that he gave the money here involved to Doores for the express purpose of escaping criminal prosecution.

“Q. Why were you giving her all of this money?

A. Well, it was hush money.

Q. What, if anything, did the possibility of your being (123) arrested and prosecuted have to do with your giving her this money?

A. That was why I gave it to her in the first place, to keep from being prosecuted.

Q. Will you state whether or not you believed she was turning it over to the various narcotic agents of the Treasury Department?

A. Yes, sir; I thought she was.

(Ex. 2, p. 204)

Further:

“Q. What further did she report to you or say to you at that time after the 'phone call, what did she say that Graven had said?

A. That he had to have \$6,500 more.

Q. What did she say it was for?

A. To hush the narcotic agent in Seattle by the name of Bangs.

Q. Bangs, the Chief Inspector?

A. Yes, sir. (128)

Q. She used Mr. Bang's name?

A. Yes, sir.”

(Ex. 2, p. 208)

In substance the appellee throughout his entire testimony and without exception fully acknowledged that he intended the monies paid to Shirley Doores, of which the \$5,950 here sought is a portion, to be paid to her for the sole purpose of bribing two narcotic agents of the Treasury Department situated at Seattle, Washington, and thus escape prosecution for the unlawful sale of narcotics to Shirley Doores and others.

Pari delicto is defined in Bouvier's law dictionary, page 2454, as follows:

“In a similar offense or crime; equal in guilt or legal fault.”

The rule, as contended by the appellant, is well stated in *12 Am. Juris.* 213, pages 725, 726, 727, as follows:

“Generally, however, in cases in which the parties are in *pari delicto*, the courts not only refuse to enforce rights arising out of an executory illegal agreement, but even where the agreement has been executed in whole or in part by one of the parties, as, for instance, by the payment of money, the courts, notwithstanding the other has received the benefit thereof without giving anything in return, generally refuse to give relief, unless, as will be seen, the former repudiates the agreement before the execution of the unlawful purpose. Moreover, the general rule is that neither party to an agreement that has been executed on both sides will be aided in recovering what he has parted with under the agreement. Thus, where money has been paid on an illegal agreement, it is a general rule that if the agreement is executed and the parties are in *pari delicto*, neither can recover from the other the money so paid. * * * *Money paid to suppress a threatened prosecution for a crime cannot be recovered back.*”

The above rule was applied in *Clark v. United States*, 102 U. S. 322 at page 331, wherein the Supreme Court held that money paid to bribe an officer of the United States placed the claimants and the money they corrupted in *pari delicto* and that, accordingly, the claimants could not recover back from him the money they paid nor from the United States after it was seized from a dishonest official.

The rule is similarly stated in *United States v. Thomas*, 75 F. (2d) 369 and in *United States v. Con-noughton*, 39 F. (2d) 237.

The Supreme Court of the State of Washington has universally held that no action can be based upon an illegal contract or one that is against public policy by a party in *pari delicto*. See *Miller v. Myers*, 158 Wash., 643; 291 Pac. 1115. The same rule is announced in the recent case of *Armitage v. Hogan*, 25 Wash. (2d) 672; 171 Pac. (2d) 830.

The trial court, in its written opinion in this case, announced that it found the appellee, Dr. Teed, "guilty of attempted bribery" (Tr. 11). In addition, it should be remembered that Dr. Teed was actually convicted in the State Courts of Idaho for a narcotic violation arising out of the dispensation of narcotics to Shirley Doores. This Court will take judicial notice that under the Harrison Narcotic Act the appellee could have been charged with a similar narcotic violation in Federal District Court.

The appellant, therefore, respectfully urges that the relationship of *pari delicto* was conclusively established by the testimony of Dr. Teed himself wherein he admitted illicit traffic in narcotics and admitted the intent to bribe a Federal officer to escape apprehension; by the trial court's declaration in its opinion that Teed was guilty of attempted bribery; by the arrest and subsequent conviction of Teed in the Idaho State Court.

The establishment of the relationship of *pari delicto*, therefore, makes necessary the application of the rule contended for by the Government, namely, that parties in *pari delicto* as a matter of public policy may not maintain an action for the recovery of tainted funds.

Crime Against the Government

It is respectfully urged by the appellant that the trial court was in error in determining as a matter of law

that appellee was entitled to the return of said money where the crime of attempted bribery has been committed against the Government and said money seized under search warrant by the Government as evidence of that unlawful purpose.

It is appellant's contention that appellee is not entitled to maintain an action for the recovery of the money here involved for the reason that the monies were used by him in the perpetration of a crime against the Government as that principle is announced in the case of *United States v. Galbreath*, 8 F. (2d) 360, a District Court case of the Northern District of California. In the *Galbreath* case the defendant assisted a prohibition agent by the name of Caveny in the performance of his duties. The defendant was not an officer of the United States. In the course of assisting Caveny the defendant asked for and received from petitioner the sum of \$300 which was given to defendant and accepted by him as a bribe to prevent petitioner's arrest for a violation of the National Prohibition Act. Both men were arrested and the money was taken from defendant's possession by another Government agent. Defendant was convicted of extortion. The petitioner sought the return of the \$300 on the ground that it was his money. The Court denied the petition for the return of said money in the following language:

"It is sufficient to say that in the case at bar it affirmatively appears that defendant represented, and petitioner intended and believed, that Caveny, who in fact was a de jure officer, was to share in the money in question. Petitioner, therefore, was guilty at least of an attempt to commit bribery, if not of that crime itself. It is of course unthinkable that a court of justice will assist in the recovery of property voluntarily surrendered under such circumstances."

It will be noted that the *Galbreath* case is identical to the case at bar. In the instant case Dr. Teed, appellee, was found guilty by the court of the crime of attempted bribery (Tr. 11). The appellee, as petitioner herein, "intended and believed" that both Graben and Bangs were in fact de jure narcotic officers and were to share in the money which he paid to Shirley Doores (Tr. 204-208). The money was taken from Shirley Doores's possession by another Government agent and after having been admitted in evidence in the extortion case, was duly deposited in the registry of the court. Shirley Doores was convicted of conspiracy to extort said money. It is submitted that it is likewise "unthinkable that a court of justice will assist appellee in the recovery of property under such circumstances."

The trial court in the case at bar admitted in his opinion that the above *Galbreath* case was the only cited case squarely in point. He stated that although it was entitled to consideration as persuasive authority, he was not bound to follow it and he declined to follow it (Tr. 12).

It is strenuously urged by appellant that the rule as laid down in the *Galbreath* case should not be discarded. As a matter of public policy the Court should not intervene to extricate persons who have implicated themselves through acts malum in se from their plights. The cases of *Second Russian Insurance Company v. Miller*, 268 U. S. 552 and *Marshall v. Lovell*, 19 F. (2d) 751, c. d. 276 U. S. 616, are authority for the above rule and are followed in main by every court in the land. It is quite evident that the appellee in this case was victimized because he had been in the business of illegally peddling narcotics, a business which is certainly malum in se. To permit the return of such monies to appellee is to return to him the tools which

he used in the perpetration of his crime. Such permit does not only transcend public policy and justice but serves to encourage crime.

Nor should this Court be concerned with the fact that no bona fide Government official ever received a portion of the bribery monies. Dr. Teed intended unequivocally that said monies should be paid to both Graben and Bangs who were then and now are bona fide narcotic officers situated in Seattle, Washington. The fact that Teed was misled by Doores and his effort to bribe Federal officers was unsuccessful should not put him in a better position than he would have been in had the persons whom he intended to corrupt actually been officials of the United States.

Past Punishment

Finally, it is appellant's contention that the Court should not have considered the amount or extent of past punishment sustained by appellee in determining whether or not the appellee was entitled to the return of the monies here involved. That such consideration was given by the Court is shown by the opinion of the Court (Tr. 11), by Finding of Fact No. 6 (Tr. 16), and by Conclusion of Law No. 3 (Tr. 16). The Court said further in its opinion that, among other things, the appellee has been deprived of the right to follow his profession. There is no evidence that he has actually been deprived of that right, but in any event the question of whether he is legally entitled to the return of these monies should not be tempered with the consideration of sufficiency of punishment. We think this requires no citation of authority.

CONCLUSION

The judgment of the trial court entered on the 21st day of February, 1950, should be reversed and judgment should be entered on behalf of the Government denying the petition of appellee for the return of the sum of \$5,950 now in the registry of the District Court for the Eastern District of Washington.

Respectfully submitted,

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN,
Assistant United States Attorney
Attorneys for Plaintiff-Appellant

APPENDIX

Title 28, United States Code:

Section 2041. Deposit.

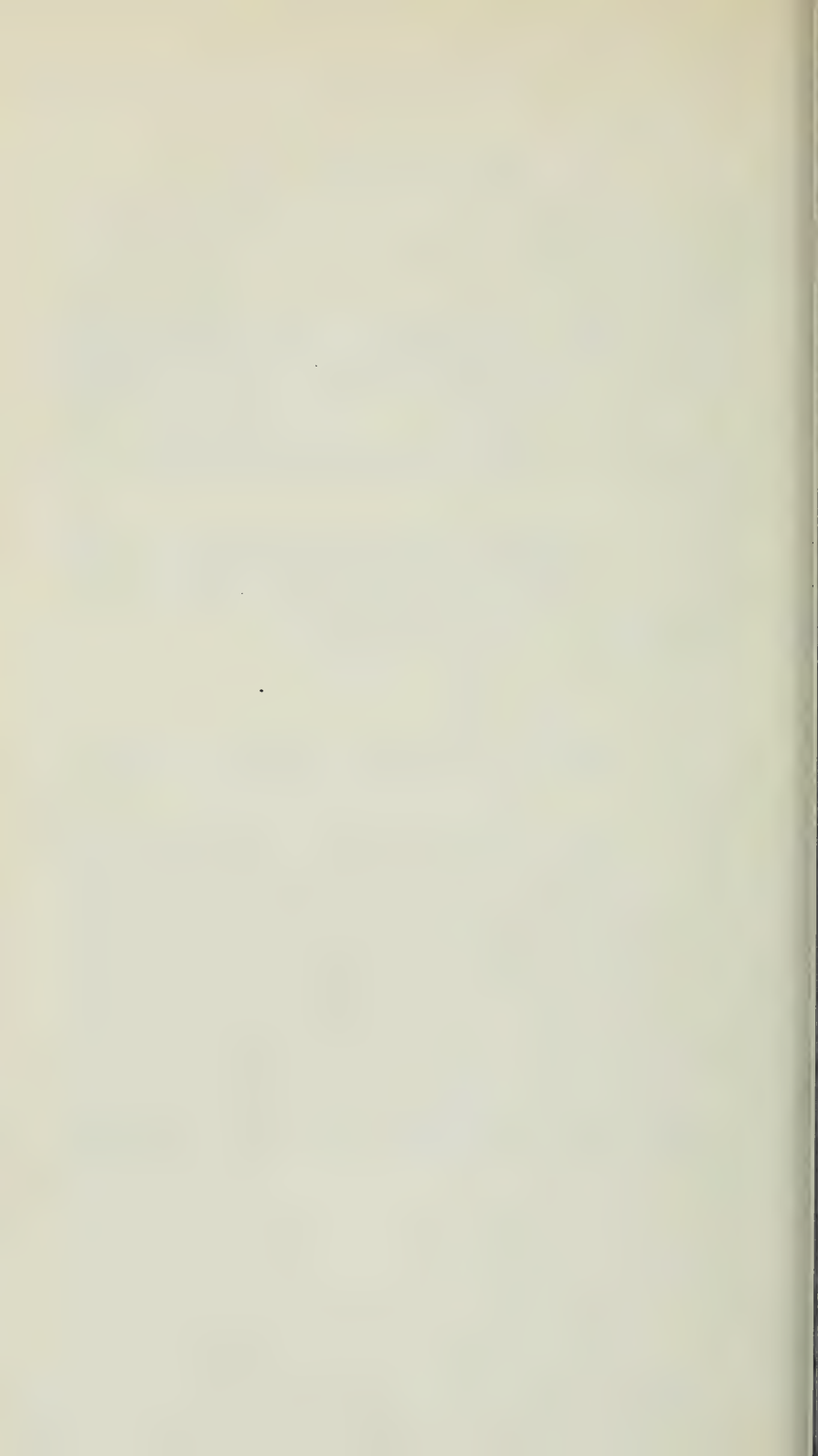
All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depository, in the name and to the credit of such court.

This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

Section 2042. Withdrawal.

No money deposited shall be withdrawn except by order of court.

In every case in which the right to withdraw money deposited in court has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the persons entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.



No. 12556

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

VS.

EDWARD H. TEED,
Appellee.

No. 12556

*On Appeal from the District Court of the United
States, for the Eastern District of Washington*

Brief for the Appellee

PAINE, LOWE & COFFIN,
R. E. LOWE,
ALAN P. O'KELLY,
622 Spokane and Eastern Building,
Spokane 8, Washington,
Attorneys for Appellee.

INDEX

	<i>Page</i>
Statement of Jurisdiction.....	2
Statement of the Case.....	2
Points and Authorities on Motion to Dismiss.....	3
Summary of Argument on the Merits.....	5
Argument	6
Crime Against the Government.....	6
Pari-Delicto	10
Conclusion	14

TABLE OF CASES

	<i>Page</i>
Adams Express Co. v. Reno, 48 Mo. 264.....	14
Berman v. Coakley, 243 Mass. 348, 137 N. E. 667.....	12
Bertschinger v. Campbell, 99 Wash. 142, 168 Pac. 977.....	13
Bock v. Felker, 302 Ill. App. 116, 23 N. E. (2d) 568.....	12
Chatham and Phenix Nat. Bank of City of New York v. Guaranty Trust Company of New York, 256 Fed. 90; cert. den. 31 Sup. Ct. 492, 250 U. S. 642, 63 L. Ed. 1185.....	5, 10
Clark v. U. S., 102 U. S. 322.....	13
Daum v. Urquhart, 61 S. D. 431, 249 N. W. 738.....	12
Farmers Loan & Trust Co. v. Waterman, 1 Sup. Ct. 131, 106 U. S. 265, 27 L. Ed. 115.....	4
Fowler v. U. S., 273 Fed. 15.....	8
Graham v. U. S., 15 F. (2d) 740, cert. den. 274 U. S. 743.....	8
Grier v. Union National Life Ins. Co., 217 Fed. 293.....	4
Hamilton Trust Co. v. Cornucopia Mines Co. of Oregon, 223 Fed. 494.....	4
Henderson v. Plymouth Oil Co., 13 F. (2d) 932.....	12
In re Michigan-Ohio Building Corp., 117 F. (2d) 191.....	4
In re Monies in Registry of District Court, 170 Fed. 470.....	5
Kiewart v. Rindskopf, 46 Wis. 481, 1 N. W. 163.....	15
King v. Buttolph, 30 F. (2d) 769.....	4

TABLE OF CASES (Cont'd)

	<i>Page</i>
Liebman v. Rosenthal, 185 Misc. 837, 57 N. Y. S. (2d) 875, affd. 269 App. Div. 1062, 59 N. Y. S. (2d) 148.....	14
Lindsley v. Caldwell, 234 Mo. 498, 137 S. W. 983....	12
Morrison v. California, 291 U. S. 82, (93), 78 L. Ed. 664 (672).....	8
Pfeuffer v. Haas, Tex. Civ. App., 1933, 55 S. W. (2d) 111.....	12
St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, p. 407 and 408.....	13
Smith v. Blachley, 188 Pa. 550, 41 Atl. 619.....	12
U. S. v. Cochrane, 87 F. (2d) 3.....	5
U. S. v. Connoughton, 39 F. (2d) 237.....	14
U. S. v. Direct Sales Co., Inc., et al, 44 F. Supp. 623, 131 F. (2d) 835, aff. 319 U. S. 703.....	8
U. S. v. Galbreath, 8 F. (2d) 360.....	9
U. S. v. Klein, 106 F. (2d) 213; cert. den. 60 Sup. Ct. 295, 308 U. S. 618, 84 L. Ed. 517.....	5
U. S. v. Thomas, 75 F. (2d) 369.....	13
Ware v. Spinney, 76 Kan. 289, 91 P. 787.....	14
Wassermann v. Sloss, 117 Cal. 425, 49 P. 566.....	14
Wilbur v. Blanchard, 22 Ida. 517, 126 Pac. 1069.....	13

MISCELLANEOUS

	<i>Page</i>
6 A. L. R. (2d) 147, 149.....	4
17 A. L. R. 325.....	12
17 A. L. R. 339.....	12
A. L. R. Blue Book of Suppl. Dec., Perm. Vol., page 177.....	12
2 Am. Jur. 941 (Appeal and Error, Sec. 149, 150).....	4
8 Am. Jur. 886 (Bribery, Sec. 2).....	7
8 Am. Jur. 890 (Bribery, Sec. 10).....	7
12 Am. Jur. 213, p. 725, 726, 727.....	11
12 Am. Jur. 736 (Contracts, Sec. 219).....	11
4 C. J. S. 348 (Appeal and Error, Sec. 176).....	4
4 C. J. S. 350 (Appeal and Error, Sec. 177).....	4
2 R. C. L. 52 (Appeal and Error, Sec. 33).....	4
Williston on Contracts, Revised Edition, Vol. 5, p. 4509-4517, Sec. 1612-1616.....	11

STATUTES

	<i>Page</i>
29 Stat. 578.....	10
36 Stat. 1083.....	10
41 Stat. 654.....	10
18 U. S. C., Sec. 201-223.....	7
18 U. S. C., Sec. 3612, formerly Sec. 570.....	9
28 U. S. C., Sec. 2041.....	10
28 U. S. C., Sec. 2042.....	2, 10
28 U. S. C. (Rev.), Sec. 1291.....	2

No. 12556

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

EDWARD H. TEED,
Appellee.

No. 12556

*On Appeal from the District Court of the United
States, for the Eastern District of Washington*

Brief for the Appellee

PAINE, LOWE & COFFIN,
R. E. LOWE,
ALAN P. O'KELLY,
622 Spokane and Eastern Building,
Spokane 8, Washington,
Attorneys for Appellee.

STATEMENT OF JURISDICTION

This action was brought in the District Court of the United States, Eastern District of Washington, Northern Division, pursuant to the provisions of Sec. 2042 of Title 28, U.S.C. Judgment was entered on the 21st day of February, 1950. (Tr. 16 and 17). Notice of appeal was filed on April 19, 1950. (Tr. 17 and 18). This court has jurisdiction of the subject matter of the action under Sec. 1291 of Revised Title 28, U.S.C.

STATEMENT OF THE CASE

Appellee generally concurs with the statement of the case and statement of facts contained in appellant's brief on pages 2, 3, 4, and 5.

The statement of facts, however, should be supplemented by stating that the present action was first commenced by Shirley Doores who, on June 6, 1949, filed a motion with the United States District Court for the Eastern District of Washington, requesting an order directing the Clerk to disburse to her the sum of \$6,150, of which sum the amount of \$5,950 here in controversy is a part. (Tr. 2 and 3). It was conceded that the balance of \$200.00 was the property of Miss Doores and is not involved in this appeal.

Appellee intervened in the action brought by Shirley Doores so that she is a party to the action resulting in the judgment appealed from herein. Shirley Doores was not represented in person at the time of the hearing but her duly authorized attorney submitted

the matter to the court without argument (Tr. 24, 25) on the basis of the record made at pretrial deposition of Shirley Doores (Tr. 39-51), and photostatic copies of bank statements were offered in evidence, but rejected. (Tr. 24, 25).

Miss Doores' attorney was notified of the time and place set for the hearing. There has been no appeal in this case by Miss Doores.

Concurrently with this brief, appellee has filed a motion to dismiss this appeal on the ground that the appellant is not aggrieved by the decree.

POINTS AND AUTHORITIES ON MOTION TO DISMISS

The United States of America is not an aggrieved party and is in no way legally affected by the order herein appealed from. As shown by appellant's statement of facts contained in its brief, the money here involved was taken from a safety deposit box which was under the control of Miss Shirley Doores. It was also conceded that this was the money which appellee, Dr. Teed, had given to Miss Doores. It is obvious that the money belonged either to Miss Doores or to Dr. Teed, unless there is some statute or law which resulted in a forfeiture of this money after it was seized and used as evidence in a criminal prosecution for extortion. Unless there is some provision for such forfeiture, which we have not been able to find and to which appellant makes no reference, the United States of America has no legal interest in the money but is merely the stake-holder, holding money for the

benefit of the persons to whom it is legally entitled. They assert no basis of any right to the money as such, but just object to its being turned over to appellee.

It is fundamental law that a party to a suit who is in no manner affected by the decree has no right to appeal. This interest must be immediate and pecuniary and not a remote consequence of the judgment.

4 C. J. S. 348 (Appeal and Error, Sec. 176);
 2 Am. Jur. 941 (Appeal and Error, Sec. 149,
 150);
 2 R. C. L. 52 (Appeal and Error, Sec. 33);
Farmers Loan & Trust Co. v. Watermann,
 1 Sup. Ct. 131, 106 U. S. 265, 27 L. Ed.
 115;
In re Michigan-Ohio Building Corporation,
 117 F. (2d) 191.

A mere stake-holder, or even an executor or trustee, who has no interest of his own in the outcome of a suit determining the distribution of funds under his control, has no right to appeal from such order of distribution.

4 C. J. S. 350 (Appeal and Error, Sec. 177);
Grier v. Union National Life Insurance Co.,
 217 Fed. 293;
Hamilton Trust Co. v. Cornucopia Mines Co.
of Oregon, 223 Fed. 494;
King v. Buttolph, 30 F. (2d) 769;
 See Note, 6 A. L. R. (2d) 147, 149.

It is true that the United States of America is in some cases allowed to intervene in actions brought to withdraw funds from the registry of the Federal

Court, such as in the case of *United States v. Cochrane*, 87 F. (2d) 3, but in such cases, the United States is representing possible owners of the fund who are not represented and is acting as a trustee for them. In this case, the only persons having any possible or conceivable interest in the ownership of this fund were represented in court, and there is no conceivable person that the United States could represent as trustee. The United States derives no claim to this money from the fact that it was deposited in the registry of the court. Monies so deposited are not public monies of the United States.

Chatham and Phenix Nat. Bank of City of New York v. Guaranty Trust Co. of New York, 256 Fed. 90; cert. den. 31 Sup. Ct. 492, 250 U. S. 642, 63 L. Ed. 1185.

Sections 2041 and 2042 of 28 U. S. C. do not provide for any forfeiture of funds.

In re Monies in Registry of District Court, 170 Fed. 470.

State governments may escheat unclaimed monies deposited in the registry of the United States District Courts.

U. S. v. Klein, 106 F. (2d) 213; cert. den., 60 Sup. Ct. 295, 308 U. S. 618, 85 L. Ed. 517.

It should be noted also that the money here involved was still in the registry of the court and had not been deposited in the treasury under Section 2042. We have found no decisions interpreting this

statute, but it seems that the proper interpretation of the statute should be that the United States attorney is entitled to notice of petition to withdraw monies only after the five year period had passed and the money had been deposited in the treasury to the credit of the United States.

We, therefore, feel that the only parties interested in this matter are Shirley Doores, the United States District Court for the Eastern District of Washington, and the appellee, and that the appellant, United States of America, has no legal or substantial interest in this appeal, and the appeal should be dismissed.

SUMMARY OF ARGUMENT ON THE MERITS

Appellee, it is conceded, had supplied Miss Shirley Doores with narcotics in violation of the federal and state laws. After the crime had been committed, Miss Doores and her compatriots devised a scheme to extort money from appellee. Through representations to him that he would be arrested and tried for violation of the law, Miss Doores and her accomplices instilled in him a state of fear of apprehension and induced him to turn over large sums of money aggregating some \$14,000 which was to be used to prevent his prosecution and resultant punishment and disgrace.

Appellee may have had a guilty intent but was not guilty of bribery or attempted bribery, and it is clear from the statement of facts, agreed to by both appellant and appellee, that Miss Doores and her conspira-

tors were the moving parties and induced the action of appellee, and, therefore, appellee was not in *pari-delicto* with Miss Doores. It is conceded by appellant that this was appellee's money and, in effect, it is admitted by appellant that if appellee was not in *pari-delicto* with Miss Doores, he is entitled to its return.

ARGUMENT

For the sake of clarity, appellee will reverse the first two sections of appellant's argument, since appellant's first argument assumes conclusions reached in its second argument.

CRIME AGAINST THE GOVERNMENT

The government makes no contention that Dr. Teed could be guilty of bribery but charges that he is guilty of attempted bribery.

At common law, the crime of bribery comprehends the crime of attempted bribery. (8 Am. Jur. 890, Bribery, Sec. 10). Likewise, both bribery and attempt to bribe are included in the same federal statute. (18 U. S. C. Sec. 201-223, formerly Sec. 91, et al). The gist of the offense is the offering, giving, receiving or soliciting of anything of value with intent to influence the recipient's action as a public official. (8 Am. Jur. 886, 18 U. S. C. Sec. 201-223). Obviously, there must be at least an offer of something of value to an official.

In this case, there was not even an attempt by

anyone to approach, offer, or tender anything to a public official and there was thus no attempt to bribe. On the contrary, Miss Doores had no intention of offering the money to any public official. It was a pure case of extortion.

There was also no conspiracy to bribe. While a formal agreement between the parties concerned is not necessary, there must be a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.

Fowler v. U. S., 273 Fed. 15;

U. S. v. Direct Sales Co., Inc., et al, 44 F. Supp. 623, 131 F. (2d) 835, aff. 319 U. S. 703;

Graham v. U. S., 15 F. (2d) 740, cert. den. 274 U. S. 743.

Most applicable to this case are the words of Justice Cardozo in *Morrison v. California*, 291 U. S. 82 (93), 78 L. Ed. 664 (672):

“Doi was not a conspirator however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design.”

Since Dr. Teed was the only person who ever expected any of this money to find its way to a federal officer, there was no one who shared this design and purpose and therefore there could be no conspiracy to bribe.

The only case seemingly in conflict with appellee's contention as to the issue of bribery is the case of

United States v. Galbreath, 8 F. (2d) 360, a District Court case. The case can be distinguished on the ground that the person to whom the petitioner gave the money was in fact assisting an officer. Here the money was paid to Miss Doores and was not turned over, and there was no intention to turn it over to anyone having any connection with a federal officer. However, there seems in the *Galbreath* case to have been little consideration given to the necessary elements to constitute an "attempt to bribe," no citation of authority, and the money was directed to be paid into the registry of the court under the Act of January 7, 1925. (18 U. S. C., Sec. 3612, formerly Sec. 570). Former Sec. 570 provided:

"All moneys received or tendered in evidence in any case, proceeding, or investigation in any United States court, or before any officer thereof, which have been paid to or received by any official as a bribe, shall after the conclusion and final disposition of the particular case, proceeding, or investigation in which it was received as evidence, be deposited in the registry of the court to be disposed of under and in accordance with the order, judgment or decree of the said court, to be subject, however, to the provisions of Section 852 of Title 28. (Jan. 7, 1925, c. 33, 43 Stat. 726)."

Present Sec. 3612 is substantially the same with minor changes in phraseology.

Since the money was never "paid to or received by any official as a bribe," the statute was not applicable, but it is probable that this point was not presented to the court. Since in the present case, this

statute is not applicable, there would seem to be no statute which even inferentially authorizes the retention by the government of the money here in question.

The only applicable statutes are contained in 28 U. S. C. 2041 and 2042 (formerly 28 U. S. C., Sec. 851 and Sec. 852, 41 Stat. 654, 29 Stat. 578 and 36 Stat. 1083). Deposits of monies in court under these statutes are not public monies of the United States.

Chatham v. Phenix Nat. Bank of the City of New York v. Guaranty Trust Co. of New York, 256 Fed. 90.

The appellant injects a theory that since there is evidence that appellee violated the Federal Narcotics Laws that the appellant should have the right in this proceeding to levy a fine upon him by depriving him of his money, which the District Court happens to have in its registry. The money here involved had no connection with narcotic violations but only with the extortion scheme. The appellant cites no authority for its proposition, and it is difficult to understand how, under our system of law, this proceeding can be turned into a criminal action to punish the appellee for a possible violation of a federal law. This is not a criminal prosecution and this suggestion of the appellant is quite inept. Appellee has paid at least one legal penalty and the Court can take judicial notice of the fact that appellee has paid an even more serious penalty in the form of disgrace and loss of his means of livelihood.

PARI-DELICTO

The appellant's primary argument is based on the contention that the appellee was in *pari-delicto* with Miss Doores and her assistants. The appellant cites one section of Am. Juris (12 Am. Jur. 213, pages 725, 726, 727), stating the rule for which it contends. (Appellant's Brief, p. 11). The same work can be cited for the appellee. In 12 Am. Jur. 736, (Contracts, Sec. 219), the following statement is found:

"The doctrine that the parties to an illegal transaction are not in *pari-delicto* and that the less guilty may recover is especially applicable where, although the parties concur in the illegal act, some fraud, duress, oppression, imposition, or undue influence is practiced by one party upon the other so that it appears that the guilt of the latter is subordinate to that of the former. Thus, money paid to suppress a threatened prosecution for a crime can be recovered back where the payment has been extorted or induced by duress, oppression, or undue influence. * * *"

It is conceded that there is a conflict of authority on whether money paid under threat of criminal prosecution may be recovered. The best discussion of this problem may be found in *Williston on Contracts, Revised Edition*, Vol. 5, p. 4509-4517, Sec. 1612-1616. On pages 4513-14, Mr. Williston states:

"Some courts have held not only that a bargain induced by such threats is one to stifle prosecution, but that the parties thereto are in *pari-delicto*. That these cases are erroneous is manifest in view of the rule that where an illegal transaction is caused by coercion of one of the parties, the other is not in *pari-delicto*."

Mr. Williston cites *Henderson v. Plymouth Oil Co.*, 13 F. (2d) 932, where the court held in a case involving threat of arrest that a transfer of stock was void and a redelivery would be ordered where the transfer was made under duress, whether the transferor was guilty of a felony or not.

As Professor Williston points out, the cases which refuse to upset a settlement made under threat of prosecution are all, or nearly all, cases where it appears that merely a fair settlement was obtained. An exhaustive list of the many cases on this subject is contained in a note in 17 A. L. R. 325 and in A. L. R. Blue Book of Supplemental Decisions, Permanent Volume, p. 177. It is not felt that the Court would desire an exhaustive discussion of each of these cases, but they do bear out the statement made by the annotator (17 A. L. R. at p. 339):

“The courts in general endeavor to protect the victims of extortion, pure swindle or blackmail, whether they are plaintiffs or defendants.”

Some of the cases not cited in the note in 17 A. L. R. but supporting this contention are:

Smith v. Blachley, 188 Pa. 550, 41 Atl. 619;
Daum v. Urquhart, 61 S. D. 431, 249 N. W. 738;
Pfeuffer v. Haas, Tex. Cir. App. 1933, 55 S. W. (2d) 111;
Bock v. Felker, 302 Ill. App. 116, 23 N. E. (2d) 568;
Berman v. Coakley, 243 Mass. 348, 137 N. E. 667;
Lindsley v. Caldwell, 234 Mo. 498, 137 S. W. 983.

Authority in both the states of Washington and Idaho, wherein the transactions took place and which should determine the property rights in this money, seems in accord with the doctrine contended for by appellee.

Bertschinger v. Campbell, 99 Wash. 142, 168 Pac. 977;
Wilbur v. Blanchard, 22 Ida. 517, 126 Pac. 1069.

The Washington cases cited in appellant's brief on page 12 are obviously not in point since there is no element of coercion in the cases cited. The acts of the parties in those cases were purely voluntary acts.

The case of *Clark v. U. S.*, (102 U. S. 322), cited by the appellant, is not applicable to this case. *Clark v. U. S.* was a clear case of bribery and there was no duress. It appears that the action of the briber was purely voluntary and nowhere in the case is there any discussion of the doctrine here contended for.

The case of *U. S. v. Thomas*, 75 F. (2d) 369, cited by the appellant, is also not in point for the same reason. It should be pointed out that this case, in addition to citing *Clark v. U. S.* supra, cited *St. Louis, V. & T. H.R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393. The court, in the latter case, at pages 407 and 408, states:

“* * * For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime and the stifling of a criminal prosecution, and therefore clearly illegal, can-

not be recovered back at law, nor the conveyance set aside in equity, *unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor.*" (Italics added).

The appellant cites *U. S. v. Connoughton*, 39 F. (2d) 237. There a defendant was charged with conspiracy to bribe. The sum of \$300.00 was found upon his person when seized. He pleaded guilty to the charge. Two of his co-defendants were acquitted; another pleaded guilty. He asked for return of the \$300.00. The court ordered its return. Whether the money was actually ever offered to a federal agent is not clear.

If it is an authority at all, it is an authority for appellee.

Since there was no transfer or even offer of transfer of this money to any federal official, the most that can be said for the appellant's position is that Dr. Teed put money into the hands of a purported agent with the intent that such agent should use the money for the purpose of bribing federal officials, although the agent had no intention of doing so.

There are several well considered cases holding that money placed in the hands of an agent for the purpose of bribing or otherwise illegally using influence, but not so used, is recoverable by the principal.

Wasserman v. Sloss, 117 Cal. 425, 49 P. 566;
Ware v. Spinney, 76 Kan. 289, 91 P. 787;
Adams Express Co. v. Reno, 48 Mo. 264;
Liebman v. Rosenthal, 185 Misc. 837, 57 N.

Y. S. (2d) 875, affd. 269 App. Div. 1062,
59 N. Y. S. (2d) 148;
Kiewert v. Rindskopf, 46 Wis. 481, 1 N. W.
163.

CONCLUSION

While we have attempted to answer in some detail the arguments of the appellant, this matter can be decided on a fairly simple basis. The District Court has found that the money in question is appellee's money, and that he is entitled to its return; and unless the appellant can show some reason why such money should not be returned to appellee, he is entitled to have it paid over to him. The appellant has shown no right to the money and no statutory or other authority for confiscating this money or imposing such a penalty upon Dr. Teed, and, therefore, the appellant's claim to the money must necessarily fail.

Respectfully submitted,

PAINE, LOWE & COFFIN,

R. E. LOWE,

ALAN P. O'KELLY,

622 Spokane and Eastern Building,
Spokane 8, Washington,

Attorneys for Appellee.

No. 12557

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DOROTHY BRAY,

Appellant,

vs.

ALEXANDER GEORGE PECK,

Appellee.

APPELLEE'S BRIEF.

PERRY BERTRAM,

752 Occidental Life Building, Los Angeles 15,

Attorney for Appellee.

FILED

OCT 10 1950

PAUL P. O'BRIEN,

CLERK

TOPICAL INDEX

	PAGE
Statement of the case.....	1
Argument	2

I.

The findings of fact require the conclusion that the premises were decontrolled by the Housing and Rent Act of 1947.....	2
--	---

II.

The court's finding that the property was known as a hotel is supported by the evidence.....	4
--	---

III.

The court's conclusion that there was no violation of the Rent Control Act or Regulations in the sale of the furniture is supported by the findings and required by the evidence.....	7
---	---

IV.

Appellant's motion for a new trial was properly denied by the trial court	10
Conclusion	11

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Goldberg v. List, 11 Cal. 2d 389.....	4
Leff v. Knewbow, 47 Cal. App. 2d 360.....	4
Porter v. Jorgensen, 63 Fed. Supp. 13.....	9
Woods v. Benson Hotel Court, 81 Fed. Supp. 46.....	3
Woods v. Western Holding Corp., 173 F. 2d 655.....	5, 6

STATUTES

Controlled Housing Rent Regulations, Sec. 202(c)	6
Controlled Housing Rent Regulations, Sec. 825.1(b)(iv)(b) (12 F. R. 4331).....	3
Rules of the District Court of the United States for the South- ern District of California, Rule 3(d).....	10
Rules of the District Court of the United States for the South- ern District of California, Rule 17(b)(1).....	10
Rules of the District Court of the United States for the South- ern District of California, Rule 17(3).....	10

No. 12557
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DOROTHY BRAY,

Appellant,

vs.

ALEXANDER GEORGE PECK,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

As appellant points out in her Statement of the Case, the premises in question were owned in 1942 by Ralph C. Gilbert who was renting the structure for \$45.00 per month. In 1946 the property was purchased by Robert C. Chambers who indicated to the then Office of Price Administration that he was operating the premises as a hotel. In the fall of 1947 the defendant entered into an agreement to purchase the property from Mr. Chambers and during a period of about two months operated the premises in close conjunction with Mr. Chambers. In May of 1948 the lease involved in this action was executed between the plaintiff as lessee and the defendant as lessor.

The respects in which appellant's statement of the case do not disclose the evidence which establishes the defense and requires the judgment entered by the court below will be pointed out and discussed in the development of the argument.

ARGUMENT.

I.

The Findings of Fact Require the Conclusion That the Premises Were Decontrolled by the Housing and Rent Act of 1947.

Finding No. 3 recites that in 1946 Robert C. Chambers registered the entire premises as a hotel under the name Rilla Hotel. Finding No. 4 finds that the defendant upon acquiring the property *continued* to operate said premises as the Rilla Hotel and goes on to find that the defendant *provided* the usual hotel type services.

These findings were based upon substantial evidence. Mr. Chambers in 1946 had registered the premises as a hotel [Defendant's Exhibit A]. During Chambers' ownership the Los Angeles City Telephone Directory contained a listing of the telephone under the name "Rilla Hotel" which was continued during defendant's ownership [Tr. Vol. II, p. 87, line 13, to p. 88, line 3]. Mr. Chambers had stated to Mr. Peck in October of 1947 that "everything was decontrolled by the O. P. A." [Tr. Vol. II, p. 73, lines 6 and 7]. The property was given over to Mr. Peck by Mr. Chambers as the Rilla Hotel and premises [Tr. Vol. II, p. 66, lines 21 and 22]. For two or three months during the period the property was in escrow from October, 1947, Chambers and the defendant operated the property together [Tr. Vol. II, p. 85, line 23, to p. 86, line 4].

The foregoing evidence required the court to draw the inference that defendant Peck continued to operate the property as a hotel in the same manner that his predecessor Chambers operated it and that Chambers so operated it from November, 1946, when he registered it with the O. P. A. as a hotel.

Appellant must concede that if the occupants of the various rooms were “provided” with customary hotel services then the entire premises was exempt as a hotel. As pointed out by the appellant, Controlled Housing Rent Regulations, Section 825.1 (b) (iv) (b), 12 F. R. 4331, provided that entire structures where twenty-five or less rooms were rented or offered for rent and all of the accommodations in such structures were exempt or decontrolled are themselves exempt. The question then becomes what is meant by the term “to whom were provided customary hotel services” within the meaning of the regulation.

The appellant argues that since the occupants of the quarters above the garage did not receive all of the services which the occupants of the rooms within the main building received the premises could not be exempt as a hotel because not *all* of the occupants were *provided* with such services. This very question was considered by the United States District Court for the District of Minnesota in *Woods v. Benson Hotel Court* (1948), 81 F. Supp. 46. The units in the premises there involved were occupied by permanent guests all of whom had kitchen and dining room accommodations. Out of 190 units only 66 were completely furnished, 115 were partially furnished, 31 had linen service and 7 had maid service. The remaining units did not have furniture or any service, but the management was prepared to give them furniture, linen, and maid service at extra cost. The court held that in order to be a decontrolled hotel it was not necessary that the tenants actually *receive* all of the services. It is sufficient, said the court, that the services are available either with or without extra costs.

II.

The Court's Finding That the Property Was Known as a Hotel Is Supported by the Evidence.

Appellant apparently contends that to be sufficient the court's finding must follow the exact language of the statute. Respondent knows of no such rule.

To the contrary the rule is that the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon. Whenever from the facts found by it other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court and upon an appeal from that judgment the appellate court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment.

Goldberg v. List (1938), 11 Cal. 2d 389;

Leff v. Knewbow (1941), 47 Cal. App. 2d 360.

Applying this rule of construction it is at once seen that when the court finds that in 1946 Chambers registered the premises as the "Rilla Hotel" (Finding No. 3); that upon acquiring said property the defendant continued to operate the premises as the Rilla Hotel (Finding No. 4); and that during such operations by the defendant the premises were known as "Rilla Hotel" and were so listed in the telephone directory and on the records of the office of the housing expediter (Finding No. 5); and these findings were made in the light of such evidence, for example, as the evidence that Mr. Chambers had the premises listed in the telephone directory as "Rilla Hotel," there can be no question but what the court below has made the necessary findings upon

which to base its conclusion that the property was exempted from rent control as a hotel.

Some of the evidence supporting and requiring these findings is pointed out by appellant herself and need not be repeated. In addition the record is replete with evidence of the hotel type services which were furnished by the defendants and inferentially by his predecessor Mr. Chambers. The guests were provided with daily cleaning and maid service supplied by the defendant and his wife, were supplied with daily change of linens, and with telephone service.

Appellant urges that the presence of cooking facilities removed it from the category of a hotel. Such an argument was resolved adversely to the position of the appellant by the Court of Appeals for the Eighth Circuit in *Woods v. Western Holding Corp.*, 173 F. 2d 655. In this case the court pointed out that there are three types of hotels, the commercial or transient business hotel, the apartment hotel, and the family hotel. The hotel there involved was an apartment hotel in which each apartment contained bath, kitchenette and dinette facilities. Many of its guests were permanent. The Housing Expediter argued that as used in the Housing and Rent Act of 1947 "hotel" means a place where transients are lodged and where there is no provision for individual cooking in rooms. The court rejected the Expediter's theory and referred to a Congressional Committee Report which indicated that since by the terms in effect immediately prior to enactment of the 1947 Act transient hotels were excluded from control, the language used in the 1947 Act was intended to extend the exclusion to hotels catering to permanent guests.

As a matter of fact, as the court pointed out, the Housing Expediter himself had issued an interpretation of Sec-

tion 202(c) “. . . ‘hotel’ is interpreted to include all types of hotels, such as transient hotels, residential hotels, apartment hotels, or family hotels.” Upon the legislative history and the plain language of the act the court held that the fact that the accommodations included kitchenette and dinette facilities in no way removed the building from the category of hotels exempted from rent control.

Appellant characterizes the services rendered by the owners of the hotel here involved as “meager.” Reference too is made to the fact that in 1947 the local office of the Housing Expediter issued orders which indicated that the property was still under rent control. As to the latter the unjustified position of the Housing Expediter is discussed by the Court of Appeal in the *Woods* case. Thus it was pointed out that upon the enactment of the 1947 Act the Housing Expediter took the position that in order to be within the definition of “decontrolled housing accommodations” as a hotel the establishment must have provided *all* of the services mentioned in the act. When the bill was up for renewal in 1948 the Congressional debates clearly indicated that Congress did not intend by the 1947 Act that only hotels offering all of the mentioned services would be decontrolled. For example, Senator Caine said, “. . . it was not intended (by the 1947 Act) that the failure to provide a telephone service or a bellboy would necessarily prevent an establishment from being decontrolled.”

It is clear therefore that upon the evidence in this case that the premises were known as the Rilla Hotel, were operated as a hotel, and hotel type services were furnished to the guests, the finding that the premises were known and operated as a hotel finds ample support in the record.

III.

The Court's Conclusion That There Was No Violation of the Rent Control Act or Regulations in the Sale of the Furniture Is Supported by the Findings and Required by the Evidence.

It is interesting to review the background of Mrs. Bray's conduct before entering into the transaction complained of in this action.

Long before she met Mr. Peck she was the owner and operator of a boarding house. She leased this boarding house to a Mr. Romich and as a condition of executing the lease required him to purchase the furniture for \$1000.00 [Tr. Vol. II, p. 49, line 21, to p. 50, line 6].

During the weeks immediately preceding the opening of negotiations upon the Rilla Hotel the plaintiff had employed Mr. Robert A. Smith of the Fitzpatrick Realty Company to negotiate for her the lease of certain premises on Elden Street for \$200.00 per month and to purchase the furniture located on those premises for \$6000.00 [Tr. Vol. II, p. 29, lines 1 to 11; Deft. Ex. E]. During the course of her negotiations on the Elden Street property, her agent Mr. Smith, saw the defendant's property offered for sale under the classification "Hotels for Sale" and went to see that property. When the Elden Street transaction fell through he spent some considerable time persuading the defendant to agree to the same type of transaction as the plaintiff was attempting to negotiate on the Elden Street property. It was plaintiff's agent Mr. Smith, who established the terms of the transaction. He suggested the rental and he suggested the purchase price of the furniture [Tr. Vol. II, p. 104, line 2, to p. 105, line 18].

In this connection it may be borne in mind that the plaintiff was in the business of operating boarding or rooming houses while plaintiff had never had any experience along similar lines [Tr. Vol. II, p. 29, lines 17 to 24; p. 79, lines 10 to 13].

It is obvious, therefore, that the overwhelming weight of the evidence supports the court's finding that the defendant did not require the plaintiff to purchase the furniture as a condition of renting or leasing the premises involved but that the offer came from the plaintiff and was accepted by the defendant.

It was appellant's burden to establish by a preponderance of the evidence that the defendant required the plaintiff to purchase the furniture as a condition of renting the property in question *in order to evade the requirements* of the Housing and Rent Act of 1947 and the regulations.

The first obstacle to be overcome by appellant in order to support her contention is the uncontroverted fact that all of the parties in May of 1948 were dealing with this property as a decontrolled hotel. The first time Mr. Smith mentioned the property to appellant he told her it was a decontrolled hotel [Tr. Vol. II, p. 39, lines 16 to 19]. Mr. Peck believed it was a decontrolled hotel. Under these circumstances it cannot be contended that even if the appellant's testimony that defendant stated he would not consider renting the place unfurnished had been accepted by the court as true there was any intent to evade the rent control act or the rent regulations.

Appellant places much emphasis upon the testimony of its witness that the market value of the furniture was only \$850.00. As explained by Mr. Smith, in buying and

selling hotel properties the primary consideration is the amount of income being produced as a going business. He, therefore, taking into consideration the fact that the gross income from the Rilla Hotel was over \$500.00 per month, established the rental of \$175.00 per month for the real property and \$7000.00 as the purchase price of the furniture as a reasonable consideration for acquiring the Rilla Hotel as a going business. Under these facts it is absolutely immaterial what the furniture might have been sold for piece by piece or what it might have been purchased for piece by piece.

In the case of *Porter v. Jorgensen* (1946, S. D. Cal., Yankwich), 63 Fed. Supp. 13, the defendant ran an ad reading "Now vacant. Will rent five-room house to party buying furniture \$950.00. Rent \$26.00. 4121 - 29th Street." The defendant did not obtain the consent of the O.P.A. to sell the furniture. The tenant resold most of the furniture, obtaining the sum of \$200.00. The court held that the evidence was not sufficient to show a "tie-in" sale evasive of the rent regulations.

Finally, even the testimony offered on behalf of appellant herself would not, assuming the court had accepted it as true, establish her contention. This testimony was simply that the defendant was asked if he would consider renting the place unfurnished. There was no testimony that he was asked whether he would consider renting the place furnished but without requiring the appellant to purchase the furniture. She did not offer to rent it furnished at an increased rental rather than to rent it and buy the furniture. In this state of the record the court, even had it accepted appellant's testimony as true, could not have made a finding that the transaction was in violation of the act.

IV.

**Appellant's Motion for a New Trial Was Properly
Denied by the Trial Court.**

Preliminarily it should be pointed out that the motion for new trial insofar as it was based upon newly discovered evidence was not supported by the affidavit of the party and by the affidavit of the attorney showing that the evidence was in fact newly discovered and why it could not with reasonable diligence have been produced at the trial and what diligence was used. These affidavits are required by *Rule 17(3)* of the Rules of the District Court of the United States for the Southern District of California.

The failure to file such affidavits constitutes a waiver by the moving party of the motion. *Local Rule 3(d)*. The motion did not specify a particular error or errors in law relied upon nor did it specify the particulars wherein the evidence was claimed to be insufficient. Accordingly the trial court would have been justified in disregarding each of these two grounds. *Local Rule 17(b)(1)*.

Apart from technical objections which alone justified the denial of the motion the court properly denied the motion based upon the substance of the grounds urged.

The appellant was not taken by surprise by the contention that the premises in question were decontrolled housing accommodations by virtue of being a hotel. As she herself testified when she first heard of the property from her agent Mr. Smith she was told that the establishment was a decontrolled hotel. This was also told her by Mr. Peck. Accordingly she knew all along that the property was a decontrolled hotel and that the transaction entered into was not subject to rent control for that reason.

The appellant did not object to the introduction of evidence concerning the hotel type services furnished by the defendant on the ground that such evidence was not within the issues framed by the pleadings nor that she was taken by surprise. Nor did she request an adjournment to afford her the opportunity to produce evidence.

Finally, on the basis of the affidavits and counter-affidavits submitted on the motion for new trial, it is at once apparent that all that was sought to be offered upon a new trial was the evidence of witnesses whose testimony would be controverted by other witnesses. The court properly exercised its discretion in weighing the conflict of evidence which would be before it upon the receipt of such testimony and it must be presumed that in passing upon the motion for new trial and considering the affidavits before it the court determined that should each of the witnesses testify as indicated in the affidavits the court's finding of fact would remain the same and be adverse to the appellant on the issue presented. Accordingly the trial court's denial of the motion was a proper exercise of its discretion and should not be disturbed.

Conclusion.

It is obvious that the appellant entered into this transaction knowing that the premises were decontrolled and operated as a hotel within the meaning of the Housing and Rent Act of 1947. She knew that the income from the property being in excess of \$500.00 per month it was very profitable for her to lease the property for \$175.00 and purchase the furniture for \$7000.00 in order to take possession of the hotel as a going business. If it were not for the fact that after taking possession

of the premises she became greedy, this case would never have found its way into the court. The first thing she did was spend some \$350.00 upon the rooms over the garage and then raised the rent to \$90.00 a month for those rooms. She at once began reducing and eliminating the hotel type services. First of all she cut out the daily cleaning service [Tr. Vol. II, p. 54, lines 10 to 15]. She then cut out the telephone service [Tr. Vol. II, p. 54, line 21, to p. 55, line 9]. This, of course, caused tenants to become dissatisfied and some of them obviously not knowing that the premises were decontrolled as a hotel complained to the housing expediter. No doubt upon investigation and finding that the services customarily provided by a hotel were not being given the office of the housing expediter reached the conclusion that the property was not a hotel and held Mrs. Bray responsible.

The conduct of Mrs. Bray may be summarized as follows: First, she induced Mr. Peck to execute the lease and sell her the furniture on her own terms despite the fact that he had planned to make an outright sale of the hotel. Second, she then began raising rents and eliminating and reducing services which accomplished two results, the increasing of her own net income and the removal of some of the characteristics of the establishment as a hotel. Third, she then consented to the entry of a small judgment for over-charge of rent against her. Whether or not all of this was the result of a preconceived plan on her own part to subject Mr. Peck to an enormous liabil-

ity to her, it is unnecessary to determine. She must not be permitted to take advantage of her own wrongdoing.

The defendant having established that the property was a decontrolled hotel within the meaning of the Housing and Rent Act of 1947 as amended and the regulations issued thereunder the judgment of the court below should be affirmed.

Respectfully submitted,

PERRY BERTRAM,

Attorney for Appellee.

No. 12,558

IN THE
United States Court of Appeals
For the Ninth Circuit

EDDIE MATTOX and BERTHA MATTOX,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

**Appeal from the United States District Court for the
Northern District of California, Southern Division.**

BRIEF FOR APPELLANTS.

REED M. CLARKE,
1355 Ellis Street, San Francisco 15, California,
Attorney for Appellants.

FILED

JAN 24 1951

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
Nature of the case and of the appeal	1
Comment and authorities	6
The findings do not sustain the conclusions and judgment based thereon	21
The Court erred in failing to make separate findings as to matters which are peculiar to each of the several counts of the complaint	24
Appellants' reply to cross-appellant's brief	27
Conclusion	34

Table of Authorities Cited

Cases	Page
Abbott v. Eastern Mass. Str. Co. (C.C.A. 1), 19 F. (2d) 463	14
Application of Murra, 166 F. (2d) 165.....	26
Atchison, T. & S. F. R. Co. v. Sullivan, 173 F. 456, 97 C.C.A. 1	14
Berssenbrugge v. Luce Mfg. Co., 30 F. Supp. 101.....	17
Chicago, B. & Q. R. Co. v. Willard, 220 U.S. 413.....	20
Cole v. Blankenship (C.C.A. 4), 30 F. (2d) 211.....	15
Concord C. & C. Co. v. U. S. (C.C.A. 2), 69 F. (2d) 78.....	18
Crawford Co. T. & S. Bank v. Crawford Co. (C.C.A. 8), 66 F. (2d) 791, cert. den. 291 U.S. 664.....	15
Creedon v. Polis (D.C. Pa.), 7 F.R.D. 652.....	30
Creedon v. Seele, 75 F. Supp. 767	30
Demulso Corp. v. Tretolite Co. (C.C.A. 10), 74 F. (2d) 805..	19
Denaro v. Maryland Baking Co. (C.C.A. 1), 35 F. (2d) 351..	15
Electro T. P. Corp. v. Strong (C.C.A. 9), 84 F. (2d) 766....	19
Floyd v. Davis, 98 Cal. 601, 33 P. 746.....	30
Gaglione v. Katz (1950), 7 N.J. Super. A.D. 151, 72 A. (2d) 381	14
Gatch, Tennant & Co. v. Mobile & O. R. Co. (D.C. Ala.), 59 F. (2d) 217	20
Hammerstein v. Toy Nat'l Bank (C.C.A. 8), 81 F. (2d) 628	15
In re Peterson (D.C. Mich.), 8 F. Supp. 86.....	18
Jackson v. Woods (C.A. Tex., 1950), 182 F. (2d) 338.....	31
King Iron Bridge & Mfg. Co. v. Otoe Co., 120 U.S. 225, 30 L.Ed. 623, 7 S.C.R. 552	19
Loomis v. Callahan, 196 Wis. 518, 220 N.W. 816.....	33
Mathers & Mathers v. Urschel (C.C.A. 10), 75 F. (2d) 591...	19
Matthew v. Coppin (C.C.A. 9), 32 F. (2d) 100.....	19

TABLE OF AUTHORITIES CITED

iii

	Pages
Maryland Cas. Co. v. Glassell-Taylor & Robinson (C.C.A. 5), 156 F. (2d) 519.....	15
Milderman v. Roth (D.C. Pa.), 9 F. (2d) 637.....	19
Miller-Cranshaw Co. v. Colorado M. & E. Co. (C.C.A. 8), 84 F. (2d) 930	20
Miller v. First Service Corp. (C.C.A. 8), 84 F. (2d) 680....	18
Mira v. Mishan, 91 N.Y.S. (2d) 426, aff'd 95 N.Y.S. (2d) 904, 276 App. Div. 1008	18
Moore v. Chesapeake & O. R. Co., 291 U.S. 205.....	14
National Lead Co. v. Chicago R.L. Bd. (D.C. Ill.), 8 F. Supp. 820	15
New England T. Co. v. Meyers (D.C. Mass.), 15 F. Supp. 807	14
Ocean Industries, Inc. v. Green (D.C. Cal.), 15 F. (2d) 862..	15
Ogden Levee Dist. v. K. C. Southern R. Co. (C.C.A. 8), 39 F. (2d) 884	19
Palestine Tel. Co. v. Palestine (D.C. Tex.), 1 F. (2d) 349...	14
Panteleo v. Colt's Patent Fire Arms Mfg. Co., 13 F. Supp. 989	17
Penner v. Geller, 87 N.Y.S. (2d) 249, 193 Misc. 821.....	13
Porter v. Warner Holding Co., 328 U.S. 395.....	25
Powers v. Chesapeake & O. R. Co., 169 U.S. 92, 42 L.Ed. 673, 18 S.C.R. 264	19
Ramseyer v. Contestabile (D.C. Pa. 1949), 86 F. Supp. 104	14
Realty Holding Co. v. Donaldson, 294 F. 541.....	14
Rexford v. Brunswick-Balke Co., 228 U.S. 339.....	19, 20
Robinson v. U. S. (C.C.A. 5), 84 F. (2d) 885.....	20
Six Wheel Corp. v. Sterling M. T. Co (C.C.A. 9), 50 F. (2d) 568	20
Southern Pacific Co. v. McAdoo (C.C.A. 9), 82 F. (2d) 121	19
Southern Pacific R. Co. v. Query (D.C.-S.C.), 21 F. (2d) 333	14
St. Louis etc. R. Co. v. Davis (C.C. Ark.), 132 F. 629.....	19
State v. Tyler Co. State Bank (Tex. Com. App.), 282 S.W. 211, 45 A.L.R. 1453	30
U. S. v. Cowan's Estate (D.C. Mass.), 91 F. Supp. 331....	25
U. S. v. Gianoulis, 183 F. (2d) 378.....	7

	Pages
U. S. v. Mashburn (D.C. Ark.), 85 F. Supp. 968.....	30
U. S. v. Strymish (D. C. Mass.), 86 F. Supp. 999.....	24
Ver Merren v. Sirmyer (C.C.A. 8), 36 F. (2d) 876.....	19
Wangenheim v. Garner, 42 C. A. 332	33
Whitney v. American Shipbuilding Co. (D.C. Ohio), 197 Fed. 777	19
Windholz v. Everett (C.C.A. 4), 74 F. (2d) 834.....	15
Woodhouse v. Budwesky (C.C.A. 4), 70 F. (2d) 61	18
Woods v. Haydell, 178 F. (2d) 914	32, 33
Woods v. Kooker, 83 F. Supp. 362.....	30
Woods v. Richman (C.A. Cal.), 174 F. (2d) 614	25
Woods v. Schwartz (D.C. Pa., 1950), 88 F. Supp. 42.....	31
Woods v. Stone (1948), 333 U. S. 472.....	10, 12, 13, 17
Young v. Main (C.C.A. 8), 72 F. (2d) 640.....	15

Statutes

Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1949 (50 U.S.C.A. Appendix, Section 1881 et seq.):

Section 205	2, 6, 7, 8, 10, 11, 12, 20, 21, 24, 25, 27
Section 206	20
Section 206(a)	8
Section 206(b)	2, 8, 10, 11, 12, 20, 21, 25
Section 206(c)	10, 11, 21

Rules

Federal Rules of Civil Procedure, Rule 52(a)	22, 26
--	--------

No. 12,558

IN THE
United States Court of Appeals
For the Ninth Circuit

EDDIE MATTOX and BERTHA MATTOX,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

NATURE OF THE CASE AND OF THE APPEAL.

The record before this United States Court of Appeals, on this appeal, brings up and presents for review a judgment that gives judgment in favor of the plaintiff and against the defendants in an action commenced on May 9, 1949, by the filing of the original complaint in the office of the clerk of the District Court of the United States for the Northern District of California, Southern Division, for injunctive relief, restitution and damages for alleged violation of Rent Regulations on the part of the defendants, as landlords, in demanding and receiving rentals from various tenants (twelve in number) in excess of the maximum

rent permitted by said regulations, over a period of time from November 24, 1947 to May 9, 1949, the date of the filing of said complaint. (R. 2-8.)

Jurisdiction of the Court below was invoked by the plaintiff, and the Court entertained and assumed jurisdiction of the subject matter, under provisions of Secs. 205, 206(b) and 206(c) of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1949 (50 U.S.C.A. Appendix, Sec. 1881 et seq.). Subsequent to the filing of the original complaint, and after the defendants had filed an answer to said complaint (R. 9-10), the plaintiff, pursuant to the requirement of the Rules of Civil Procedure, Rule 15(a), on August 19, 1949, moved the Court "to amend the complaint on file herein", upon noticed motion (R. 19), and on the hearing of the motion it was by the Court ordered that plaintiff's motion "to amend complaint" be granted. (R. 19-20).

On September 8, 1949, plaintiff filed an amended complaint, which contains four counts, two based on the amended Section 206 (b) of the Housing and Rent Act of 1947 for injunctive relief, including an order for restitution of alleged excessively collected rentals, limited to the period of one year prior to the filing of the complaint, and the others based on the amended Section 205 of the said Act, for judgment for triple damages in respect of such excessive rent collections within one year before the filing of the complaint, but diminished by the amount of restitution which may be ordered, in respect of rentals collected during the like period.

Defendants having filed an answer to the amended complaint, wherein they allege, in further answer and as a separate and affirmative defense, to each of the four counts of the complaint, that the count fails to state any facts or acts or claim against them, or either of them, upon which relief can be granted. (Par. 6 (R. 34), Par. 4 (R. 35), Par. 3 (R. 36), Par. 3 (R. 37).)

The action went to trial on December 9, 1949, and was tried to the Court, without a jury, upon the issues joined by the "Amended Complaint" and the answer thereto; and upon the conclusion of the trial, the Court gave and rendered its decision in the form of findings of fact and conclusions of law (R. 38-43), by which it, *inter alia*, substantially found: The premises described in the amended complaint were controlled housing accommodation within the meaning of the Housing and Rent Act of 1947, as amended, and Rent Regulations for the enforcement thereof, and that the defendants in violation of provisions of said Act, and said Regulations, demanded, accepted and received from each and every one of the twelve tenants, as set forth in Exhibits "A" and "B" attached to plaintiff's amended complaint, amounts in excess of the legal, maximum rents as set forth in said exhibits, to the total sum of \$6,761.80. (R. 39-41.)

The Court specially found that the violations of the Act and the Regulations committed by the defendants were neither willful nor the result from the failure of the said defendants to take practicable precautions. (R. 41.)

Further findings of the Court (following the allegations of Counts III and IV of the Amended Complaint) are:

“IV.

“That on or about June 2, 1949, Henry A. Cross, the duly appointed Director for the San Francisco Bay Defense Area, pursuant to the authority granted him under the Housing and Rent Act of 1947, as amended, and the regulations issued pursuant thereto, did under Sections 825.5(c)(3) and 825.5(b) of said Rent Regulations, issue orders reducing the maximum rent for those certain housing accommodations known as Numbers 1805, 1805A, 1811, 1813A, 1815, 1817, 1819, and 1823 Ellis Street, San Francisco, California, and that by the terms of the said orders the defendants and each of them were required to refund to the tenants of the aforesaid housing accommodations any rent collected from the effective date of said orders, in excess of the amount provided in said orders within 30 days from the date of the said orders.

“V.

“That Defendants, Eddie Mattox and Bertha Mattox and each of them were in violation of the orders referred to in Finding No. IV above, in that they have wholly failed either within the 30 days required under the orders referred to in Finding No. IV above, or at any time or at all, to make the refunds required by the said orders.

“VI.

“That the orders of the San Francisco Bay Defense Rental Area referred to in Finding IV

above, were duly served in accordance with the regulations issued pursuant to the Housing and Rent Act of 1947, as amended, upon defendants Eddie Mattox and Bertha Mattox.”

From the findings of fact, the Court concluded: That it had jurisdiction of the subject matter of the action and of the parties under the amended Sections 205, 206(b) and 206(c), of the Housing and Rent Act of 1947; that plaintiff was entitled to a permanent injunction as prayed for in its amended complaint; and that plaintiff, on account of the aforesaid violations, is entitled to judgment requiring and directing defendants to forthwith refund to the plaintiff, in behalf of the tenants named in the aforesaid exhibits “A” and “B”, the sums set forth as overcharges opposite their names in said exhibits, being the total sum of \$6,761.50, or in the alternative, to the Treasurer of the United States, and directed that judgment be entered in accordance therewith. (R. 42-43).

Judgment, based upon the findings of fact and conclusions of law, was entered in the Court below on March 8, 1950. (R. 46). From that Judgment the appellants (defendants below) have appealed and prosecute this appeal to this United States Court of Appeals for the Ninth Circuit. Notice of Appeal was filed on April 25, 1950, (R. 47), within the time allowed by Rules of Civil Procedure, Rule 73(a), where the United States of America is a party to the action, and jurisdiction of the said cause, and of said appeal, is conferred to this Court by Section 1291 of the Judicial Code (28 U.S.C.A. Sec. 1291).

Parenthetically, we deem it not amiss to here remark that the appellee (plaintiff below), without having filed any notice of appeal pursuant to the Rules of Civil Procedure, Rules 73(a), and 73(b), has appeared in this Court to prosecute an appeal from the judgment of the Court below, by way of a cross-appeal, and has filed a brief as such cross-appellant on the assumed grounds and theory advanced in said brief that the Court below erred (A) in denying any statutory damages pursuant to Section 205 of the Act; and (B) in failing to enter a Judgment for three times the amount of the overcharge, because the defendants neither pleaded nor proved the lack of willfulness and the taking of practicable precautions as provided in Section 205 of the Act. (Cr.-App. Br. 6). Cross-appellant closes its brief in chief with a short and streamlined suggestion that this Court should affirm the judgment of the Court below, and remand the case with directions to enter a judgment for either the amount of the overcharges, or for treble that amount. (Cr.-App. Br. 19). This notwithstanding the restitution order for the amount of the overcharges and the finding of the Court below, as above stated, that the acts of the defendants complained of "were neither willful nor did they result from the failure of said defendants to take practicable precautions".

COMMENT AND AUTHORITIES.

As previously indicated, the case presents some peculiar phases and introduces some exceedingly novel

innovations. The questions raised on the record, although confined within sufficient definite limits, touch a wider field of law at many points and are, as we find them, largely affected by numerous decisions and statutes, some of which are still in plastic state*—to say nothing of the general principles of common law, and of equity—that the task of presenting anything like a concise, logical brief on the case has not been a light one. In order that this Court may understand the grounds of error which are made the basis of this appeal, and as conducive to a clear presentation and explanation of the points relied upon by them for a reversal of the judgment from which the appeal was taken, and to a lucid exposition of the relevancy, pertinency, force and importance of such points in their bearing upon the questions raised upon the record, and on which the decision of the cause depends, the following narrative of matters vital to the appeal, as they appear from the record, is respectfully submitted.

The record discloses the following irrefutable facts and circumstances which form a true approach to the questions involved. The action was commenced on May 9, 1949. Plaintiff's authority to sue and the relief sought by it arises under amended Sections 205

*See *U. S. v. Gianoulis*, 183 F. (2d) 378, with respect to the retroactive operation of amended Section 205 of the Housing & Rent Act of 1947 (50 U.S.C.A. Appendix, Sec. 1895) effective April 1, 1949, conferring authority on the United States to sue, where the Court said:

“Although we can find no reported decisions on the point by any court of appeals, District Courts, both within and without this Circuit, have had frequent occasion to rule on this point. These decisions, however, are in sharp conflict.”

and 206(b) of the Housing and Rent Act of 1947. (50 U.S.C.A. Appendix, Secs. 1895 and 1896.)

The original complaint filed in the action contained two counts. The gist of the first count was that defendants have engaged in acts and practices which constitute violations of Section 206(a) of the Housing and Rent Act of 1947, as amended, in that since July 1, 1947 defendants demanded and received from tenants occupying their premises, rentals in excess of the lawful rental permitted by the Rent Regulations. The gist of the other count was that since July 1, 1947, and within one year prior to the date of the commencement of the action (exclusive of the 30-day period immediately prior to the date of the commencement of the action) the defendants demanded and received from tenants occupying their premises in excess of the lawful rental permitted by the Rent Regulations, and that more than thirty days have elapsed since the occurrence of the violation alleged, and the persons from whom such excess rentals were demanded, accepted or received, have not instituted any action under amended Section 205 of the Housing and Rent Act of 1947 for said violations. (R. 2-4.)

Nowhere in the complaint was it alleged that at the time of the commencement of the action, nor does it appear therefrom, that the defendants were in default of obedience to any refund orders or order issued by the Area Rent Director, or any public authority, commanding refund of the excessive rentals alleged to have been collected.

On September 8, 1949, some four months after the commencement of the action, the plaintiff filed its "Amended Complaint", having been granted leave by order of Court below to file an "Amended Complaint", which contains four counts, the first two (Counts I and II) being the same as the two counts in the original complaint. (R. 2-4, 20-22.)

Each of these counts, like their predecessors, is utterly destitute of any allegation that at the time of the commencement of the action the defendants were in default of obedience to any refund orders or order that had been issued by the Area Rent Director, or other public authority, commanding refund of the excessive rentals alleged to have been collected. These two counts are directed at excessive rentals alleged to have been collected from four tenants named in Exhibit "A" attached to the amended complaint. The other two counts (Counts III and IV) of the "Amended Complaint" are based entirely upon retroactive refund orders issued by the local Area Rent Director on June 2, 1949, more than three weeks after the commencement of the action, reducing the maximum rent for the premises involved, and requiring the defendants to refund to the tenants any rent collected from the effective dates of said retroactive orders, in excess of the amount provided therein, within thirty (30) days of the date of said orders. The gist or gravamen of these counts is that more than thirty days have passed since the date of the said orders and the defendants have wholly failed to make any or all of the refunds so ordered. (R. 23-24.)

It is to be noted that Counts III and IV of the amended complaint, taken together, do no more than undertake to state a single cause of action. Both of them relate to a group of eight tenants named in Schedule "B" attached to the amended complaint.

The foregoing facts and circumstances, especially the belated efforts on the part of the plaintiff to create and bring before the Court a cause of action which admittedly was non-existent at the time of the commencement of the action, disclosed by its "Amended Complaint", and the findings of fact and conclusions of law based thereon, standing alone and exclusive of the binding admissions of plaintiff's counsel on the trial in bringing the attention of the Court below to the doctrine laid down by the Supreme Court in the case of *Woods v. Stone* (1948), 333 U.S. 472, hereinafter set forth, sufficiently speak for themselves; and, with all due respect to the learned judge presiding on the trial in the Court below, we are absolutely at a loss to conceive how the judgment appealed from can stand or be otherwise than reversed.

The questions and propositions of law in this case thus are substantially as follows:

(1) Whether the Court erred in concluding that it had jurisdiction of the subject matter of the action under the amended Sections 205, 206(b) and 206(c) of the Housing and Rent Act of 1947;

(2) Whether the Court below had jurisdiction or authority to enter such judgment upon the facts and amended complaint;

(3) Whether the amended complaint, and each of the several counts set up therein fails to state any facts or acts or claim against the defendants upon which relief could be granted in this action under amended Section 205 or Section 206(b) of the Housing and Rent Act of 1947 (50 U.S.C.A. Appendix, Secs. 1895 and 1896);

(4) Do the findings sustain the conclusions and judgment based thereon;

(5) Did the Court err in failing to make separate findings as to matters which are peculiar to each of the several counts of the amended complaint?

To avoid unnecessary and uncommendable repetition, we shall consider the first three propositions together; they are, as will presently be seen, inter-related, and in the main the authorities applicable to one are applicable to the others. Approaching the matter at hand, we shall now proceed to show, if not, indeed, demonstrate, that:

(1) *The Court erred in concluding that it had jurisdiction of the subject matter of the action under the amended Sections 205, 206(b) and 206(c) of the Housing and Rent Act of 1947;*

(2) *There was no jurisdiction or authority upon the part of the Court below to enter such judgment upon the facts and amended complaint;*

(3) *The amended complaint, and each of the several counts set up therein fails to state any facts or*

acts or claim against the defendants upon which relief could be granted in this action under amended Section 205 or Section 206(b) of the Housing and Rent Act of 1947 (50 U.S.C.A. Appendix, Secs. 1895 and 1896).

It is definitely established that the mere demanding, accepting or receiving from tenants rentals in excess of the maximum rental permitted under the Act and Regulations, standing alone, and in the absence of any failure of the landlord to comply with an order commanding refund of the excess rentals collected does not create any obligation or duty on his part, or give rise to any action, legal or equitable, under the statute. And so says plaintiff's counsel.

Inquiring students in the law recall the unexpected and anxious result produced by throwing the squib in the celebrated squib case. But mark the novel result here. At the outset of the trial, so the record shows, plaintiff's counsel brought to the attention of the Court the eight retroactive refund orders set out in Counts III and IV of the Amended Complaint issued on June 2, 1949, and which "materially changes the aspect of the case", and pointed out that these two counts charge violation of the alleged retroactive refund orders and cited to the Court, and quoted from the case of *Woods v. Stone*, 333 U.S. 472, 68 S. Ct. 624, "which was decided March 15, 1948 and is directly on this point". (R. 50-52.) This admission runs like a marking cord through the whole warp and woof of the case. Because that case holds that "Default in obedience to requirement of refund gives rise

to the cause of action sued upon herein". It was in order that the full significance of this large admission and controlling decision should stand out in bold relief that we have heretofore set forth at length and substance the averments of the complaint and findings at the expense of brevity.

Thus it is the violation which occurred when the refund order is not obeyed within the required time that gives rise to the cause of action and authorizes the suit. "There can be no recovery of penalties or damages in the absence of a refund order." *Penner v. Geller*, 87 N.Y.S. (2d) 249, at 350, 193 Misc. 821, citing *Woods v. Stone*, 333 U.S. 472.

In reversing the judgment of the Court below on the single point "That the one-year statute of limitation began to run on the date that a duty to refund was breached", the Court said, in *Woods v. Stone* (333 U.S. 472):

"We think it clear that default in disobedience to requirement of refund gives rise to the cause of action sued upon herein."

The Court further said:

"In short, the cause of action here at issue can be created only by statute, not by regulation. The question is not one of validity of the regulations, but of statutory interpretation, not an interpretation to determine whether the statute authorized the regulations but whether it authorizes the suit."

For additional cases applying the rule that violation of a refund order is an indispensable prerequisite to

the bringing of an action, see: *Ramseyer v. Contestabile* (D.C. Pa. 1949), 86 F. Supp. 104; *Gaglione v. Katz* (1950), 7 N.J. Super. A.D. 151, 72 A. (2d) 381.

It hardly requires the test of a cold judicial touchstone to determine that the Court below had no jurisdiction to try and determine this cause. No violation of a refund order at the time of the commencement of this action had occurred, or is charged, because there admittedly was no such order then issued. On the other hand, the plaintiff is bound and estopped by the allegations of its complaint and the admission of its counsel from asserting to the contrary. Admissions of attorneys authorized to act in legal proceedings estop their principals therein. (*Atchison, T. & S. F. R. Co. v. Sullivan*, 173 F. 456, 97 C.C.A. 1.)

The Court below, on the other hand, had no jurisdiction or authority to entertain and assume jurisdiction of this cause. The foregoing requirement being jurisdictional, it must be established by the person invoking the jurisdiction of the Court. Wrongs, either in civil or criminal law are not based on prognostications. Jurisdiction must appear by pleadings or record. (*Realty Holding Co. v. Donaldson*, 294 F. 541; *New England T. Co. v. Meyers* (D.C. Mass.), 15 F. Supp. 807.) The jurisdiction of the Federal Court is to be determined by the allegations of the complaint. (*Moore v. Chesapeake & O. R. Co.*, 291 U.S. 205; *Southern Pacific R. Co. v. Query* (D.C.-S.C.), 21 F. (2d) 333; *Palestine Tel. Co. v. Palestine* (D.C. Tex.), 1 F. (2d) 349.) And facts showing jurisdiction must be pleaded. (*Abbott v. Eastern Mass. Str. Co.* (C.C.A.

1), 19 F. (2d) 463; *Denaro v. Maryland Baking Co.* (C.C.A. 1), 35 F. (2d) 351; *Cole v. Blankenship* (C.C.A. 4), 30 F. (2d) 211; *Ocean Industries, Inc. v. Green* (D.C. Cal.), 15 F. (2d) 862.) The allegations of complaint control question of jurisdiction. (*Hammerstein v. Toy Nat'l Bank* (C.C.A. 8), 81 F. (2d) 628.) It should set forth the facts and not merely conclusions as to jurisdiction. (*Crawford Co. T. & S. Bank v. Crawford Co.* (C.C.A. 8), 66 F. (2d) 791, cert. den. 291 U.S. 664.)

It is equally well established that the jurisdiction of the Federal Court is always in issue, whether raised by the parties or not. (*Maryland Cas. Co. v. Glassell-Taylor & Robinson* (C.C.A. 5), 156 F. (2d) 519, 522. See also *Windholz v. Everett* (C.C.A. 4), 74 F. (2d) 834.) It is presumed to be without jurisdiction until the contrary is made to affirmatively appear. (*Young v. Main* (C.C.A. 8), 72 F. (2d) 640. See also *National Lead Co. v. Chicago R.L. Bd.* (D.C. Ill.), 8 F. Supp. 820.)

In the present case, it is quite plain that the Court below lacked jurisdiction of the subject matter set up and undertaken to be pleaded as a cause of action in each of the separate counts of the amended complaint and should have dismissed the action for lack of jurisdiction of the subject matter, even on its own motion, on the grounds set up and pleaded as a defense in the answer to the amended complaint, and each count thereof, that it fails to state any facts or acts or claim against defendants upon which relief could be

granted. As to Counts III and IV, such affirmative defense was amplified by the allegation that it in particular fails to state or plead any facts showing that any order referred to therein was at any time prior to the commencement of the action served upon the defendants, or either of them. (Par. 3, R. 36-37.)

The original complaint, filed on May 9, 1949, as has already been pointed out, utterly fails to allege and set forth the jurisdictional facts necessary to authorize the suit—that any violation of an order commanding refund of excessive rentals collected had occurred on the part of the defendants, at or prior to the time of the commencement of the action. True, the original complaint was superseded by an “Amended Complaint”, but the amended complaint goes no farther than the original complaint in alleging, or showing, such jurisdictional facts.

Furthermore, it must be borne in mind that when the plaintiff asked leave to amend, and was granted, by an order of the Court on August 19, 1949, leave to amend the original complaint, neither the proposed amended complaint nor anything indicating the nature or extent of the proposed or contemplated amendments was before the Court (R. 19-20), and until the amended complaint was filed on September 8th, following, remained undisclosed.

The meaning of the term, “amended complaint”, and its effect in operation has been well established in our jurisprudence, but seems to have been unheeded, and less understood, by the plaintiff. An “amended

complaint'' is one which corrects faults and errors of a complaint (*Panteleo v. Colt's Patent Fire Arms Mfg. Co.*, 13 F. Supp. 989), or one which is designed to include matters occurring before the filing of the original complaint, but either overlooked or not known at the time. (*Berssenbrugge v. Luce Mfg. Co.*, 30 F. Supp. 101.) It relates back to the date of the original complaint. (Rules of Civ. Proc., Rule 15(c).) The doctrine of relation back in such cases has been applied in numerous cases.

Whatever value, then, the allegations imported into the amended complaint touching the defendants' violation of the orders issued by the Area Rent Director on June 2, 1949, reducing the maximum rent and commanding refund of the amounts set out in the amended complaint, with respect only to 8 of the 12 housing accommodations involved, may have in the present case, in reason and logic, would seem to be as an admission not only that no such violation of an order had occurred, but that no such refund order with respect to any of the defendants' housing accommodations involved had been issued at all, prior to or at the time of the commencement of the action, and as to which fact and the lack of necessary and proper allegations in the complaint to confer jurisdiction the Court below was bound to take notice. It is only the violation which occurs when the refund order is not obeyed within the required time that a cause of action arises. (*Woods v. Stone*, 333 U.S. 472, 68 S. Ct. 624.) And so says the plaintiff itself. (R. 52.) Until the expiration of the time allowed for the making of the

refund, the Court had no jurisdiction of action based on alleged violation of a refund order. See *Mira v. Mishan*, 91 N.Y.S. (2d) 426, aff'd 95 N.Y.S. (2d) 904, 276 App. Div. 1008.

The District Court must take notice of its own lack of jurisdiction. (*Concord C. & C. Co. v. U. S.* (C.C.A. 2), 69 F. (2d) 78.) It was the duty of the Court below to not only assure itself of jurisdiction of the cause (*Miller v. First Service Corp.** (C.C.A. 8), 84 F. (2d) 680), but to take note of facts which point to lack of jurisdiction (*In re Peterson* (D.C. Mich.), 8 F. Supp. 86), and to note lack of jurisdiction, irrespective of action by the parties. (*Woodhouse v. Budwesky* (C.C.A. 4), 70 F. (2d) 61, certiorari den.

*In *Miller v. First Service Corp.*, 84 F. (2d) 680, 683, it is said:

"We deem it to be fully established that it is the duty of the District Courts to assure themselves of the federal jurisdiction in every case before them, and consent given by the defendant to the exercise of jurisdiction upon subject matter not within the jurisdiction is of no avail. *U. S. v. J. M. McCorry*, et al., 56 S. Ct. 829, 80 L. Ed., decided May 18, 1936; *Cutler v. Rae*, 7 How. 729, 8 How. 615 Append., 12 L. Ed. 890, 1221; *Pianta v. H. M. Reich Co.* (CCA), 77 F. 2d 888; *Barnett v. Mayes* (CCA), 43 F. 2d 521; Note 6, 28 USCA sec. 41 (1).

"This duty can and should be enforced by this Court as to all cases coming before it from the District Courts. In the performance of our duty of enforcement we must decide if jurisdiction is an active issue, but we may act upon our own motion. In so acting upon our own motion, we must necessarily be governed by the situation and the record before us. An essential of such situation, because affecting the record brought to us, is the fact that jurisdiction was not an issue in the District Court and was not made an issue in this Court through assignment of error. In this situation we should accept a clear, intelligent finding of jurisdiction by the District Court unless we are satisfied that the record before us affirmatively shows lack of jurisdiction, or arouses grave doubt of jurisdiction. If merely a grave doubt of jurisdiction arises, we may remand to the District Court for hearing and determination upon the question of jurisdiction."

293 U.S. 573.) The Court must dismiss if want of jurisdiction appears. (*Milderman v. Roth* (D.C. Pa.), 9 F. (2d) 637.) All doubts as to jurisdiction must be resolved against it. (*St. Louis etc. R. Co. v. Davis* (C.C. Ark.), 132 F. 629; see also *Whitney v. American Shipbuilding Co.* (D.C. Ohio), 197 Fed. 777.) And it is well established that consent of the parties cannot confer jurisdiction of the subject matter. Nor can lack of jurisdiction be waived. Among the authorities supporting the proposition that jurisdiction cannot be conferred by consent, nor waived by inaction, are: *Demulso Corp. v. Tretolite Co.* (C.C.A. 10), 74 F. (2d) 805; *Mathers & Mathers v. Urschel* (C.C.A. 10), 75 F. (2d) 591; *Ogden Levee Dist. v. K. C. Southern R. Co.* (C.C.A. 8), 39 F. (2d) 884; *Ver Merren v. Sirmyer* (C.C.A. 8), 36 F. (2d) 876; *Matthew v. Coppin* (C.C.A. 9), 32 F. (2d) 100.) Courts will pass on the question of their jurisdiction over the subject matter of their own motion, even though the point is not raised by counsel. (*Rex v. Brunswick-Balke Co.*, 228 U.S. 339, 57 L.Ed. 864, 33 S.C.R. 515; *Powers v. Chesapeake & O. R. Co.*, 169 U.S. 92, 42 L.Ed. 673, 18 S.C.R. 264; *King Iron Bridge & Mfg. Co. v. Otoe Co.*, 120 U.S. 225, 30 L.Ed. 623, 7 S.C.R. 552.)

It is also established, by this Court, that jurisdiction of District Court must be determined by the Appellate Court, though not raised by the parties. (*Southern Pacific Co. v. McAdoo* (C.C.A. 9), 82 F. (2d) 121; *Electro T. P. Corp. v. Strong* (C.C.A. 9), 84 F. (2d) 766.) Anent the subject that jurisdiction may be challenged at any time and may be considered on appeal

whether the question has been raised or not, see *Chicago, B. & Q. R. Co. v. Willard*, 220 U.S. 413; *Rexford v. Brunswick-Balke Co.*, 228 U.S. 339; *Gatch, Tennant & Co. v. Mobile & O. R. Co.* (D.C. Ala.), 59 F. (2d) 217; *Six Wheel Corp. v. Sterling M. T. Co.* (C.C.A. 9), 50 F. (2d) 568; *Miller-Cranshaw Co. v. Colorado M. & E. Co.* (C.C.A. 8), 84 F. (2d) 930; *Robinson v. U. S.* (C.C.A. 5), 84 F. (2d) 885. In the last cited case, it is said that jurisdictional question may be considered, though not raised in the District Court, nor raised in the Appellate Court except by the brief.

In view of what has been shown there can be no need to multiply arguments or cite further authorities on these features of the case, which we do not believe can be made plainer by argument or reasoning.

Before we leave this feature of the case, it may not be amiss to say that the record fails to disclose that any justiciable controversy, claim or right to relief under the amended Sections 205, 206 or 206(b) of the Housing and Rent Act of 1947, existed at the time of the filing of the original complaint in the Court below, as plaintiff had suffered no injury and then had no right which it could enforce legally, and there was no wrong to remedy, and therefore its action in bringing this suit was unauthorized and premature. We maintain (and submit) that the plaintiff's right to sue created by the statute under which the action was brought is subject to and dependent upon the existence of a violation of a refund order which is a condition upon the right created.

The Court should be diligent to see that the law, which is itself reason and common sense, be applied, with the aid of right reason, to produce a reasonable result in the administration of justice. The gravity necessary in the administration of justice to entitle the law to respect necessitates that mere caprice, and practical jokes or legal gymnastics and legerdemain have no part or parcel therein.

What we have said and shown in the preceding portion of this discussion in large measure applies, of course, with equal force to the appellants' contention that—

**THE FINDINGS DO NOT SUSTAIN THE CONCLUSIONS
AND JUDGMENT BASED THEREON.**

Plaintiff, by the judgment herein appealed from, was granted injunctive relief and a restitution order for the sum of \$6,761.80, under amended Section 206(b) of the Housing and Rent Act of 1947 (50 U.S.C.A. Appendix, Sec. 1896). Plaintiff's claim to damages, under provisions of amended Sec. 205 of the Act (50 U.S.C.A. Appendix, Sec. 1895) were disallowed.

Without here setting forth in verbatim the language employed by the Court, it is quite manifest that the findings do not sustain the conclusion that the Court has jurisdiction of the subject matter of the action and of the parties under Sections 205, 206(b) and 206(c) of the Housing and Rent Act of 1947, as amended. (R. 42.) Such conclusion of ultimate fact, without any subsidiary findings of fact upon which such con-

clusion is based, certainly was not a compliance with the Federal Rule 52(a). It was made in the absence of any finding as to the jurisdictional fact, without the establishment of which plaintiff was not authorized to bring the suit,—that a violation by the defendants of an order issued by the Area Rent Director commanding refund of excessive rentals collected had occurred at the time of the commencement of the action. It is the complaint, as we have already shown, that determines jurisdiction in the Federal Court. Facts showing jurisdiction must be pleaded, and averments of the complaint is test of jurisdiction.

On the other hand, the Court did find that the defendants, in violation of the aforesaid Act and Regulations did demand, accept and receive from each and every one of the tenants, as set forth in Exhibits “A” and “B” attached to the amended complaint, amounts in excess of the legal maximum rent as set forth in said exhibits, to the total sum of \$6,761.80.

The amount in excess of the legal maximum rent set forth in said Exhibit “A” with respect to four housing accommodations and tenants is \$2,343.40. As to this amount of overcharges, there is no finding whatever that any order was issued by the Area Rent Director requiring its refund.

The Court also found, in substance, that on or about June 2, 1949, the Area Rent Director issued orders reducing the maximum amount of rent for those certain housing accommodations, eight in number, set out in Exhibit “B” to the amended complaint, command-

ing the defendants to refund to the tenants of said housing accommodations any rent collected from the date of said orders in excess of the amount provided in said orders, within thirty days from the date of said orders and that the defendants were in violation of said orders in that they wholly failed within the thirty days required under the orders to make the refund required by said orders.

An examination of Exhibit "B" of the amended complaint (R. 28) relating to the eight housing accommodations covered by the orders issued on June 2, 1949, reducing the maximum rent, readily discloses that the amount of the excess rent set out in Exhibit "B" to have been collected in excess of the amount of the legal maximum rentals, is only \$4,337.40.

Even if it be assumed, arguendo, that these eight refund orders had been violated by the defendants at the time of the commencement of the action, and were the proper subject for consideration by the Court below, in the absence of any refund order with respect to the four housing accommodations set out in Exhibit "A" to the amended complaint, the finding in question could go no further than warranting and supporting a conclusion and judgment for restitution for the said sum of \$4,337.40, and not \$6,761.80 as the Court concluded.

One thing more merits serious attention and consideration. The Court found that the orders issued by the Area Rent Director on June 2, 1949, after the commencement of the action, were "orders reducing the

maximum rent" for eight housing accommodations (R. 40); giving the language used by the Court in the finding its ordinary and well recognized meaning, the fact that these orders reduced the maximum rent, as found by the Court, is an implied finding of no less dignity that the rents collected by the defendants up to the time the said orders were issued were the legal maximum rents established under the statute and regulations for those housing accommodations. The finding is one which, as we see it, carries its own evidence along with it.

THE COURT ERRED IN FAILING TO MAKE SEPARATE FINDINGS AS TO MATTERS WHICH ARE PECULIAR TO EACH OF THE SEVERAL COUNTS OF THE COMPLAINT.

The plaintiff's claim for treble damages and claim for injunctive relief and restitution in this action against the defendant landlords under provisions of the amended Housing and Rent Act of 1947 (50 U.S.C.A. Appendix Sec. 1881 et seq.) are distinct causes of action based on separate sections of the statute, even though it is proper to join them in one complaint. (*U. S. v. Strymish* (D.C. Mass.), 86 F. Supp. 999.) Under this statute the United States is authorized, in a proper case, to bring suit for injunction and restitution of rent overcharges, and is also authorized to sue for damages when aggrieved tenant fails to do so within specified time.

Authority to sue for damages is derived from amended Section 205 of the Act (50 U.S.C.A. Ap-

pendix Sec. 1895). It is elemental that an action for damages is an action at law. Authority to bring suit for injunction and restitution of rent charges is derived from amended Section 206(b) of the Act (50 U.S.C.A. Appendix Sec. 1896(b)). It provides for injunctive relief and restitution of rent overcharges, which clearly are remedies equitable in nature. An order of restitution issued under the latter section, in *U. S. v. Cowan's Estate* (D.C. Mass.), 91 F. Supp. 331, was held to be not a judgment for damages or for penalties, but to compel compliance and is a restoration of the *status quo*, which falls within recognized power of a court of equity. So, in *Woods v. Richman* (C.A. Cal., 174 F. (2d) 614, it is said that an order for restitution of illegal rent is proper, as an equitable remedy, to effectuate policy of rent control. Thus in *Porter v. Warner Holding Co.*, 328 U.S. 395, it was held that an action for restitution is different from and independent of an action for damages.

Of the four counts in the amended complaint, two of them, viz.: Counts II and IV, are for the recovery of damages under amended Section 205 of the Act. Each of them relates to recovery of damages with respect to excessive rentals collected from a separately described and different group of tenants from the other. These matters are itemized and listed in two separate exhibits, designated and referred to in the said complaint as Exhibit "A" and Exhibit "B". Only one of these exhibits is referred to and mentioned in each of the several counts. Exhibit "A" lists the names of four tenants and sets forth excessive rentals

collected from them aggregating in amount \$2,324.40. (R. 27.) Exhibit "B" lists the names of eight tenants and sets forth excessive rentals collected from them aggregating in amount \$4,437.40. (R. 28.)

Under the Federal Rules of Civil Procedure, Rule 52(a)* the trial Court is required to find the facts specifically, and state separately its conclusions of law. This rule has been held to be mandatory. (*Application of Murra*, 166 F. (2d) 165.) In the present case, the Court below in its findings made no special finding as to Counts I and II relating to the excessive rentals collected, as shown in Exhibit "A", and as to which the Area Rent Director issued no refund orders, and which related entirely to a group of four tenants and housing accommodations which was separate and distinct from those set out and shown in Exhibit "B", but throughout its findings tied and blanketed the excessive rentals collected as shown in Exhibit "A" with those shown in Exhibit "B", as to which the Court found belated orders reducing the maximum rent were issued on June 2, 1949. It must be apparent that whatever the rule may be under other circumstances, such findings clearly were not warranted, nor do they accord with the requirement of the Federal Rule that the Court must find the facts specially, hence they were insufficient and improper.

Appellants now digress and turn to a discussion of the matters and propositions undertaken to be set up

*Rule 52: (a) "In all actions tried upon the facts without a jury, or with an advisory jury, the Court shall find the facts specially, and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. * * *"

and presented in the brief of the cross-appellant, United States of America, herein.

APPELLANTS' REPLY TO CROSS-APPELLANT'S BRIEF.

The brief of cross-appellant may fairly be said to show, as will presently be seen, that it is true in forensic strife, as in other human affairs, all things are possible, or at least, by cross-appellant's counsel, happily considered possible. Speaking generally, its whole structure, substance and gist are made up of a loose application of principles and general reproaches, based on a substratum of real facts underlying and disconnected from material, controlling facts and circumstances disclosed by the record, the net result of which is a series of points, arguments and theories which are untenable.

Broadly, as a main proposition, it is contended, by cross-appellant's aggregation of veteran counsel, that the Court below erred in failing to enter a judgment for any statutory damages, and, likewise, in failing to enter a judgment for three times the amount of the overcharges. This contention is presented, with comment and authorities, under two headings, viz.: (A) The Court below erred in denying any statutory damages pursuant to Section 205 of the Act, and (B) the Court below also erred in failing to enter a judgment for three times the amount of the overcharge because the defendants neither pleaded nor proved the lack of willfulness and the taking of practicable precautions as provided in Section 205 of the Act. (Br. 6.)

And in a short, concluding paragraph, after quoting at length the finding of the Court below to the effect that the violation of the Act and regulations issued pursuant thereto, committed by the defendants “were neither willful nor did they result from the failure of the said defendants to take practicable precautions”, and after strenuously urging that such finding has no support whatever in the record, and is “clearly erroneous”, and, after asking this Court to reverse that finding (R. 9), cross-appellant’s counsel suggest and submit that the **judgment of the Court below be affirmed** by this Court and the case remanded to the Court below with directions to enter a judgment for either the amount of the overcharges or for treble that amount. This is a most amazing proposition.

As a basis for such contentions and arguments made thereon to the effect that this case is one where it was incumbent upon the defendants to plead and prove, in mitigation of damages, that the overcharges were neither willful nor the result of failure to take practicable precautions, cross-appellant’s counsel state and represent to this Court (Br. p. 10), that “two-thirds of the violations were based on orders decreasing rent”, and that all of said orders were effective prior to issuance (if such can be conceived) and “therefore required refund”. From this premise, it is argued that since the defendants failed to oppose the issuance of the order or to appeal after its issuance, their failure to comply with its terms to refund is necessarily a knowing, and deliberate overcharge.

We have carefully examined and analyzed the cases in the brief of cross-appellant, and do not find that any of them in terms apply to the proposition in this case to which they are cited, as we view it, although the general principles reviewed tend to support the naked legal points which cross-appellant is so endeavoring to raise, as distinguished and apart from the real jurisdictional and legal issues raised on the record before the Court herein.

Application of the right legal rules to the wrong facts renders a result, of course, as erroneous as the application of the wrong rule to the right facts. In the present case, it would seem the cross-appellant does both.

The only grants of jurisdiction to Federal District Courts in the amended Housing and Rent Act of 1947, (50 U.S.C.A. Appendix, secs. 1881 *et seq.*) are in Section 1895 of the Act relating to recovery of damages and in subdivision (b) of Sec. 1896 of the Act relating to enforcement. Cross-appellant concedes that an action of restitution is independent of an action for damages. (Br. 8.)

The amended Act of 1947 can be searched from beginning to end and nothing can be found therein which confers any power upon the Court in granting an order for restitution of illegally collected rents, to either double or treble the amount thus ordered to be refunded, as requiring the Court, as ancillary to the exercise of its benign equity powers, to give judgment for damages for the amount of rents found to be illegally collected within the one year prior to the

institution of the action, and for which it has ordered restitution. The remedies of injunction and restitution with respect to overcharges by landlord for rental accommodations are equitable remedies addressed to the discretion of the Court. (*U. S. v. Mashburn* (D.C. Ark.), 85 F. Supp. 968; *Creedon v. Polis* (D.C. Pa.), 7 F.R.D. 652. See also *Woods v. Kooker*, 83 F. Supp. 362; *Creedon v. Seele*, 75 F. Supp. 767.)

Especially must this be true when the action is considered as one in "equity" which does not incline to introduce new and unusual things; although it desires the spoiled, the deceived and the wronged above all things, to have restitution where the facts and circumstances call for such relief.

It is quite obvious that counsel are unaware that equity looks to the substance and not to the shadow, to the spirit, and not the letter. It seeks justice rather than technicality; truth, rather than evasion; common sense rather than quibbling. See *State v. Tyler Co. State Bank* (Tex. Com. App.), 282 S.W. 211, 45 A.L.R. 1453.

Equity, as spoken of in the law, and as is synonymous with conscience, does not administer the statute by the varying springing whims and caprices, or the unregulated discretion of the individual chancellor in each case. Conscience is administered by fixed principles. It is founded on the law and never contravenes it.

"Equity is bound by rules of law; it is not above the law, it cannot controvert the law." (*Floyd v.*

Davis, 98 Cal. 601, 33 P. 746.) *Equitas sequitur legum* is a familiar maxim.

In the case of *Jackson v. Woods* (C.A. Tex., 1950), 182 F. (2d) 338, it is said that, where the rent charges are proven, judgment should be rendered against landlord for not less than amount of such overcharges, and relief may be either by way of restitution in appropriate circumstances, **or by a judgment for damages under a law action**, but the amount awarded by way of restitution is within the sound discretion of the Court in equity. And in *Woods v. Schwartz* (D.C. Pa., 1950), 88 F. Supp. 42, on the other hand, and to the same effect, it is said that the United States is entitled to damages for rental overcharge for housing accommodations in defense rental areas during month within year before institution of the suit therefor, in the actual amount of such overcharge, with treble damages in absence of proof of landlord's willfulness and failure to exercise practicable precaution, but **it is not entitled to order for restitution of such amount to tenants.**

Next, it seems quite vain for cross-appellant's learned counsel to argue the merits of the case on the facts, as they now and then do in its brief. What statutory damages the Court below erred in failing to enter judgment for, or the amount thereof, does not appear within the covers of cross-appellant's brief. As previously indicated, the entire contention and argument seems to rest upon the statement in the brief that two-thirds of the violations here were based upon orders decreasing rent—Plaintiff's Exhibits 5 to 12—

none of which orders are set out in the record before the Court.

And it is to be noted, that while cross-appellant's counsel rely upon and refer to these orders which they state were all effective on dates prior to issuance, they have, *ex industria*, refrained from setting out the dates the orders were issued. This significant circumstance, perhaps, was due to abundant caution, arising from what is said in the extract quoted from the case of *Woods v. Haydell*, 178 F. (2d) 914, relied upon by cross-appellant. In that case, as appears from the extract quoted from the opinion (Br. 8) the rule that "whenever it is determined that there has been an overcharge, damages for the full amount of such overcharges should be awarded". Under the circumstances present here, the amount of overcharges for which judgment should be given, is limited to overcharges found to have occurred *after* the reduction order. Otherwise put, in a case such as the present one, where the record shows that the reduction orders were issued on June 2, 1949, the judgment should have been for all overcharges found to have occurred *after* the reduction orders of June 2, 1949, even though the overcharges were nonwillful and not caused by the failure on the part of the landlord to exercise due care.

It hardly seems necessary to add that the position assumed by cross-appellant is clearly fallacious and incapable of being maintained. First, no such overcharges were pleaded or proven in the present case, but only overcharges which had occurred prior to the issuance of the rent reduction orders which the Court

found were issued on June 2, 1949, some three weeks after the action was instituted. Second, as no such overcharges as are mentioned in the *Haydell* case, were pleaded and proven, none could be awarded. Third, as we have shown in the preceding portions of this brief, the mere demanding or receiving of excessive rents by the landlord is not actionable under the statute. It is the violation of a refund order which is the actionable element that gives rise to authority to bring the suit.

Nor is this all. The rules of pleading and practice are designed to promote the righteous determination of a judicial proceeding, and in their application sight must not be lost of that purpose. (*Wangenheim v. Garner*, 42 C.A. 332, 336.) It has always been recognized as the right, if not always as the absolute duty, of a Court clothed with equitable jurisdiction, to apply its X-rays to all masks and covers and see through the real substance. (See *Loomis v. Callahan*, 196 Wisc. 518, 220 N.W. 816.)

We conclude this reply with the observation that, while much more could at this time be said, we do not feel that any useful purpose would be served by further discussing or specially criticizing the various arguments, illustrations, suggestions and innovations advanced by cross-complainant's counsel in its brief, nor that it is necessary to comment upon each of the several cases cited in it, further than that which has been done herein.

CONCLUSION.

It is respectfully submitted that all of the grounds, reasons and matters asserted and appearing herein for the reversal of the judgment appealed from, are duly authorized, raised and presented by the record on appeal, and are such as to require that the judgment of the Court below be corrected by this Court.

Appellants further and finally submit that the judgment of the Court below is one which, in matters affecting appellants' substantial rights, not the least of which are their right to the full and equal benefit of all laws and proceedings for the security of their person and property, has resulted in prejudicial error and a miscarriage of justice, and should be reversed and this cause remanded with such directions, the premises considered, as this Court may deem requisite.

Dated, San Francisco, California,

January 26, 1951.

Respectfully submitted,

REED M. CLARKE,

Attorney for Appellants.

In the United States Court of Appeals
for the Ninth Circuit

EDDIE MATTOX AND BERTHA MATTOX, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern
District of California, Southern Division

BRIEF OF CROSS-APPELLANT

ED DUPREE,
General Counsel

LEON J. LIBEU,
Assistant General Counsel

FRANCIS X. RILEY,
Special Litigation Attorney
Office of the Housing Expediter
Washington 25, D. C.

INDEX.

Page

Statement of Jurisdiction	1
Statement of the Case	2
Argument:	
I. (A) The Court below erred in denying any statutory damages pursuant to Section 205 of the Act	7
(B) The Court below also erred in failing to enter a judgment for three times the amount of the overcharge, because the defendants neither pleaded nor proved the lack of wilfulness and the taking of practicable precautions as provided in Section 205 of the Act.	8
Conclusion	19
Appendix	20

TABLE OF AUTHORITIES.

<i>Bowles v. Glick Bros. Lumber Co.</i> , 146 F. 2d 566 (C. A. 9).....	9, 14
<i>Bowles v. Hasting</i> , 146 F. 2d 94 (C. A. 5)	7, 14
<i>East v. Bowles</i> , 158 F. 2d 227, cert. denied sub. nom <i>East v. Porter</i> , 321 U. S. 827	7
<i>Fontes v. Porter</i> , 156 F. 2d 956 (C. A. 9).....	7
<i>Lerner Stores Corp. v. Lerner</i> , 162 F. 2d 160 (C. A. 9th).....	9
<i>McCoy v. Fleming</i> , 160 F. 2d 4 (C. A. 5)	10
<i>Porter v. Warner Holding Co.</i> , 328 U. S. 395.....	8
<i>Small v. Schultz</i> , 173 F. 2d 940 (C. A. 7).....	17
<i>Smith v. Woods</i> , 178 F. 2d 468 (C. A. 5).....	8
<i>United States of America v. The Earl Holding Co., et al.</i> (No. 3200), (D. C. Minn.), dated February 20, 1950, opinion unreported.....	18, 21
<i>Woods v. Haydell</i> , 178 F. 2d 914 (C. A. 5).....	7
<i>Woods v. Olinger</i> , 170 F. 2d 895 (C. A. 5)	7
<i>Woods v. Polis</i> , 180 F. 2d 4 (C. A. 3)	11
<i>Woods v. Richman</i> , 174 F. 2d 614 (C. A. 9).....	8
<i>Woods v. Tate</i> , 171 F. 2d 511 (C. A. 5).....	12
<i>Woods v. Witzke</i> , 174 F. 2d 855 (C. A. 6).....	8
<i>Zimberg v. United States</i> , 142 F. 2d 132 (C. A. 1).....	11

STATUTES AND REGULATIONS:

Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901, et seq.):

 Section 205(e) 14

Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, et seq.):

 Section 203(a) 4

 Section 205 6, 14

	Page
Controlled Housing Rent Regulation (12 F. R. 4331):	
Section 5(b)	13
Section 7(a)	12
Rent Procedural Regulation 1 (13 F. R. 2369):	
Section 840.14	20
MISCELLANEOUS:	
Federal Rules of Civil Procedure (28 U. S. C. A. foll. 723(c)):	
Rule 52(a)	9
Judicial and Judiciary Code (28 U. S. C. A. 1291):	
Section 1291	2

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12558

EDDIE MATTOX AND BERTHA MATTOX, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

**Appeal from the United States District Court for the Northern
District of California, Southern Division**

BRIEF OF CROSS-APPELLANT

STATEMENT OF JURISDICTION

Cross-Appellant, plaintiff below, cross-appeals from the final judgment which failed to award treble damages for rent overcharges in an action pursuant to Section 205 of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, *et seq.*) (R. 44). The Complaint was filed on May 19, 1949 (R. 2). The defendants answered on June 17, 1949. An amended Complaint was filed on September 8, 1949 (R. 20) and defendants filed an answer to the amended Complaint on September 30, 1949 (R. 31). The issues were tried

on the amended Complaint and Answer. Judgment was entered on March 7, 1950 (R. 44) based upon the Findings of Fact and Conclusions of Law (R. 38-44). Notice of Appeal was filed on April 25, 1950 (R. 47). Jurisdiction of the District Court was conferred by said Section 205 of the Act (R. 24). Jurisdiction of this Court is conferred by Section 1291 of the Judicial Code (28 U. S. C. A. 1291).

STATEMENT OF THE CASE

The United States of America filed suit against the defendants for violations of the Housing and Rent Act of 1947 praying for an injunction restraining continued violations of the Act and regulations, for restitution and treble damages pursuant to Sections 205 and 206(b) of said Act.

The Complaint alleged that the defendants were landlords of a housing accommodation located at 1803-23 Ellis Street in the City of San Francisco (R. 2).¹ The Complaint further alleged that the defendants were collecting rents in excess of the legal established maximum (Par. 5, R. 3). These overcharges were set out specifically in Exhibit A which was made a part of the Complaint (R. 7-8).² The defendants filed an answer to this Complaint which consisted of a general denial (R. 9).

¹ The address of these premises run from 1803 to 1823 Ellis St., but they are in reality one apartment building with separate entrances (R. 54).

² The schedule referred to contained the name of the tenant, the address of the premises, the period of occupancy, rent collected, the legal maximum rent, the number of overcharges, the amount of each overcharge and the total prayed.

While this action was pending, the United States moved for a temporary restraining order and a preliminary injunction preventing the defendants from pursuing two Unlawful Detainer actions in the Municipal Court for the City of San Francisco (R. 11-12). On July 12, 1949, the temporary restraining order was signed and an Order to Show Cause issued returnable on July 18, 1949. On July 19, 1949, an injunction was issued restraining defendants from unlawfully evicting certain tenants (R. 17).

Upon the basis of an investigation conducted during the pendency of the original Complaint (R. 51), the Government moved to file an amended complaint alleging more widespread violation than previously and overcharges of approximately \$8,000 (R. 20). The motion was evidently granted.

In Exhibits A and B of that Complaint, the overcharges are again specifically set forth (See footnote 2, *supra*) and each Exhibit is divided into two parts. The first part of Exhibit A covered by Count I prays for restitution to the tenants of all overcharges not barred by the statute of limitations (Par. 5, R. 21). Count II is based upon an action for treble damages involving the same tenants and the same premises as specifically set forth (Par. 3, R. 22). Counts III and IV cover Exhibit B and pray for damages and restitution respectively for the entire period of the overcharge (R. 28). These overcharges are based upon retroactive rent reduction orders issued on or about June 2, 1949 (Par. 3, R. 23).

The defendants filed an answer to this Complaint (R. 31-38) in which they set up various defenses. The de-

fenses to Count I are (1) that no maximum rent may be established because such action is forbidden by Section 203(a) of the Act³ (Par. 1, R. 31); (2) that the Court is without jurisdiction of the action (a) because the 1949 amendment to the Act repealed the Act itself (Par. 2(a), R. 32) and (b) the Act is unconstitutional because it is not uniform and not national in scope (Par. 2(b), R. 32); (3) that the accommodations in question are not controlled housing accommodations; and (4) a general denial (Pars. 3, 4 (R. 33)). The answer to Count II is a general denial (Par. 2, R. 35), and that the Complaint fails to state a claim (Par. 4, R. 35). The defense to Count III is that the defendants were never served with the order (Par. 3, R. 36) and as to Count IV, there is again a general denial (Par. 2, R. 37), and the charge that the Complaint fails to state a claim (Par. 3, R. 37). Nowhere do appellants plead the lack of wilfulness or the failure to take practicable precautions.

The case went to trial before the Honorable Herbert W. Erskine (D. J.) on December 9, 1949 (R. 48). There were 12 witnesses for the plaintiff, eleven of whom testified that they paid more than the legal maximum rent (R. 72, 75, 78, 81, 86, 92, 95, 97, 107-108, 115, 116, 120, 122, 124, 128, 129, 136, 138). The defendants' witnesses (eight in number) all testified that they were or had been tenants of the defendants and

³ Section 203(a) provides as follows:

“Sec. 203. (a) After the effective date of this title, no maximum rents shall be established or maintained under the authority of the Emergency Price Control Act of 1942, as amended, with respect to any housing accommodations.”

they were never overcharged during their tenancy (R. 101, 103, 153). The plaintiff's witnesses were in a measure corroborated by a neutral third party who testified that as chairman of a Union Welfare Committee who paid the rent of members who were on strike, that the defendants demanded rent in excess of the legal maximum from the Union in the amount testified above (R. 143-144).⁴

The defendants testified in their own behalf (R. 174, 196) in which they said that they kept no books; that they issued no receipts and that they had never checked with the Area Rent Office after purchasing this property to determine the legal maximum rents. The defendant, Eddie Mattox, testified that even when called to the Area Rent Office on another matter, he did not check with the Area Rent Office to determine the legal maximum rents (R. 217). Furthermore, the overcharges on eight of these apartments are based upon retroactive orders which were issued in face of the defendants' failure to appear and testify concerning them prior to issuance, although they stipulated at trial that they were notified (R. 69). So too, defendants failed to protest or appeal from the orders after their issuance.

At the conclusion of the trial, the Court below entered a judgment of restitution to the tenants in a total amount of \$6,761.80 (R. 44). The Court enjoined the defendants from charging more than the legal maxi-

⁴ Plaintiff's Exhibit 16 is particularly significant in this connection since it is the return of a check made out to the tenants for the rent but not in an amount demanded by the defendants and returned to the Union as insufficient (R. 144).

mum rents and further enjoined them from evicting any of the tenants unlawfully (R. 45). The Court, however, notwithstanding the prayer of plaintiff's Complaint for relief under Section 205 of the Act, failed to enter a judgment for any statutory damages in favor of the Government.

From that judgment, the plaintiff has taken a cross-appeal on the ground that the Court below erred in failing to enter a judgment for any statutory damages, and, likewise in failing to enter a judgment for three times the amount of the overcharges (R. 255).

ARGUMENT

I.

- (A) The Court Below Erred in Denying Any Statutory Damages Pursuant to Section 205 of the Act.**
- (B) The Court Below Also Erred in Failing to Enter a Judgment for Three Times the Amount of the Overcharge, Because the Defendants Neither Pleaded Nor Proved the Lack of Wilfulness and the Taking of Practicable Precautions as Provided in Section 205 of the Act.**

The Court below at the conclusion of the trial entered a judgment for restitution of the overcharges (R. 44), but failed to enter a judgment for statutory damages pursuant to Section 205⁵ of the Act as alleged

⁵ Section 205 of the Act provides in part, as follows:

“Sec. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or

and as prayed in plaintiff's complaint (Par. 3, R. 25). The Court below, therefore, erred in denying any statutory damages whatever and again erred in failing to enter a judgment for three times the amount of the overcharge because of the defendants' failure to plead either the lack of wilfulness or the taking of practicable precautions.

These contentions will be discussed in order.

(A) The Court below erred in denying any statutory damages pursuant to Section 205 of the Act.

This Court from the earliest days of rent control has held that when overcharges have been established, the trial court must grant a judgment in damages in an amount at least equal to the amount of the overcharges. *Fontes v. Porter*, 156 F. 2d 956 (C. A. 9th). This Court there said, at p. 958: "Lack of wilfulness, coupled with the taking of practicable precautions against the occurrence of a violation, operates only to reduce damages to the amount of the overcharge." Accord: *Bowles v. Hasting*, 146 F. 2d 94 (C. A. 5); *East v. Bowles*, 158 F. 2d 227, cert. denied, sub. nom. *East v. Porter*, 321 U. S. 827; *Woods v. Olinger*, 170 F. 2d 895 (C. A. 5); *Woods v. Haydell*, 178 F. 2d 914 (C. A. 5). As that Court said in the *Haydell* case in determining that a court must enter judgment for at least the

received, whichever in either case may be the greater amount: *Provided*, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

* * * "

amount of the overcharges when the overcharges have been found to be made:

“Whenever it is determined that there has been an overcharge, damages for the full amount of such overcharges should be awarded. *Bowles v. Hastings*, 5 Cir., 146 F. 2d 94; *Creedon, Expediter v. Olinger*, 5 Cir., 170 F. 2d 895. In this case the judgment should have been for all overcharges found to have occurred after the reduction order of May 18, 1945, even though the overcharges were nonwillful and not caused by the failure on the part of the landlord to exercise due care”. (p. 915)

The above principle of law is not affected in any way by the grant of restitution of the amount of the overcharges to the tenant since restitution was awarded pursuant to Section 206(b) of the Housing and Rent Act. The Supreme Court and this Court have held that an action of restitution is different from and independent of an action for damages. *Porter v. Warner Holding Co.*, 328 U. S. 395; *Woods v. Richman*, 174 F. 2d 614, 616 (C. A. 9th); *Smith v. Woods*, 178 F. 2d 468 (C. A. 5). And it has been held that restitution may be granted in conjunction with a judgment of damages in the sum of three times the amount of the overcharges. *Woods v. Witzke*, 174 F. 2d 855 (C. A. 6).

It thus clearly appears that the Court below erred in denying all statutory damages whatever.

(B) The Court below erred in failing to enter a judgment for three times the amount of the overcharge because of defendants' failure to prove that they were not wilful or that they took practicable precautions.

The judgment aforesaid was based upon findings of fact, among which was No. IX (R. 41):

“That violations of the Housing and Rent Act of 1947, as amended, and the Regulations issued pursuant thereto, and committed by the Defendants Eddie Mattox and Bertha Mattox, were neither willful nor did they result from the failure of the said Defendants to take practicable precautions.”

The plaintiff appeals from that finding on the ground that it has no support whatever in record and is “clearly erroneous”.

In asking this Court to reverse that finding, the Government is aware of the provisions of Rule 52(a) of the Federal Rules of Civil Procedure⁶ (28 U. S. C. A. foll. 723(c)). However, as is demonstrated hereinafter the record not only does not contain “substantial” evidence to support the above finding but is so lacking in evidence of any kind to support it, it is “clearly erroneous”. *Lerner Stores Corp. v. Lerner*, 162 F. 2d 160, 162 (C. A. 9th).

In addition, this Court has held that where the defendant attempts to reduce the damages to the amount of the overcharges, it is incumbent upon him to establish that the overcharges were neither wilful nor the result of failure to take practicable precautions. *Bowles v. Glick Bros. Lumber Co.*, 146 F. 2d 566, speaking of the twofold defense set out in Section 205(e), this Court said:

⁶ Rule 52(a) provides in part as follows:

“ * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * ”

“Such partial defenses as are afforded by the amendments must be pleaded and proved by the defendants * * *.” (at pp. 571-72) See, *McCoy v. Fleming*, 160 F. 2d 4 (C. A. 5).

In holding that both elements of mitigation must be pleaded and proved, the Court of Appeals for the Fifth Circuit stated in the *McCoy* case, *supra*, holding that where the defendant “did not even attempt” to prove that he took practicable precautions the trial court did not abuse its discretion in granting treble damages. In that connection, the Court said (160 F. 2d, at p. 5) :

“Whatever may be said upon the question of willfulness, it is perfectly clear that the court did not find, it could not have found, that the violations were not the result of failure to take practicable precautions. Here the defendant did not even attempt to prove that he took practicable precautions against the occurrence of the violations. Indeed, the record showing that he took no precautions, establishes the exact contrary. The record standing thus, the judgment awarded was entirely within the discretion of the district judge, * * *.”

An examination of the record on file herein discloses that defendants not only failed to plead the defenses provided in Section 205 of the Act, *supra*, p. 6, but the record disclosed a course of conduct deliberately intended to violate the Act. The defendants filed two answers. One, an abbreviated answer to the original complaint (R. 9), and the other, a voluminous, verbose answer to the amended complaint (R. 31-38). In nei-

ther answer do the defendants plead the lack of wilfulness and the failure to take practicable precautions. In any event, in the present state of the record such pleas would be unavailing.

Wilfulness has been defined as wrongful conduct which was “knowingly” or “deliberately”, but not necessarily “malevolently” committed:

“In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U. S. 389, 394, 54 S. Ct. 223, 225, 78 L. Ed. 381, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’ *United States v. Illinois Cent. R. Co.*, 303 U. S. 239, 242, 58 S. Ct. 533, 535, 82 L. Ed. 773. In view of this statement there can be no doubt that the court below gave the jury a correct definition of the word ‘wilfully’ as used in the statute under consideration.” (*Zimberg v. United States*, 142 F. 2d 132, 137 (C. A. 1))

And more recently a defendant was assessed treble damages where he “moved with his eyes open.” In affirming the judgment, the Court of Appeals held that the district court was justified in imposing treble damages “for intentional violation” (*Woods v. Polis*, 180 F. 2d 4, 7 (C. A. 3rd)).

The defendants here admitted that although they were responsible by express direction of the Regulation to notify the Area Office of the change of landlords,⁷ they failed to do so (R. 216). They admittedly failed to do so even though they had occasion to visit the Area Rent Office in connection with a violation of other property rented by them (R. 217). Furthermore, two-thirds of the violations here were based upon orders decreasing rent (Pl's Exhs. 5 to 12, R. 62), and which defendants stipulated were properly certified as mailed (R. 68). In addition, they stipulated that the accompanying letter, and the notice of proceedings were properly certified as mailed (R. 68). The record is silent that the defendants answered the notice, and appeared prior to the issuance of the orders, or that they protested and appealed the orders after issuance as they had a right to do.⁸

These orders were all effective on dates prior to issuance, and therefore required a refund (R. 60, 62, 64,

⁷ Section 7(a) of the Regulation provides in part:

“* * * Where, since the filing of the registration statement for any controlled housing accommodations, there has been a change in the identity of the landlord, by transfer of title or otherwise, the new landlord shall file a notice of such change on a form provided for that purpose, to be known as a notice of change in identity within 15 days after the change or July 1, 1947, whichever is later. If the new landlord indicates on the notice of change in identity that he has not obtained the landlord's copy of the original registration statement, the Expediter shall cause to be prepared and delivered to him a true copy of said original, which may be used to satisfy all requirements of this paragraph (a). * * * ”

Compare, *Woods v. Tate*, 171 F. 2d 511, 512 (C. A. 5th)

⁸ Section 840.14 of Rent Procedural Regulation No. 1 (13 F. R. 2369) provides for appeal to the Expediter. (See, text in Appendix, *infra*, p. 20).

65, 66). The orders were based upon an investigation which showed that although the defendants registered the premises as furnished apartments, they had not been rented as furnished for some time (R. 51). The retroactive refund of these premises was demanded from the date they were no longer rented furnished (R. 51). Since the defendants failed to oppose the issuance of the order, or to appeal after its issuance, their failure to comply with its terms to refund is necessarily a knowing, deliberate overcharge.

In addition to the foregoing, the defendants were under a preliminary injunction restraining them from wrongfully evicting tenants in possession (R. 49). Thus, the record shows that they were previous violators (R. 217), that they deceived the Area Rent Office in failing to report a reduction in services as provided in the regulation⁹ (R. 51), that they attempted to evict tenants wrongfully and were restrained (R. 49), and finally, that they refused to refund as ordered, although they neither appeared to contest the order, nor protested and appealed its issuance.

⁹ Section 5(b) of the Regulation provides:

“(b) *Decreases in minimum services, furniture, furnishings, equipment and space.* (1) The landlord shall, until the accommodations become vacant, maintain the minimum services, furniture, furnishings, equipment and living space as required under Section 3, unless and until he has filed a petition to decrease the services, furniture, furnishings, equipment or living space and an order permitting a decrease has been entered thereon. When the accommodations become vacant, the landlord may on renting to a new tenant decrease the services, furniture, furnishings, equipment or living space below the minimum; within 10 days after so renting the landlord shall file a written report with the area rent director showing such decrease.”

On the basis of the foregoing, defendants cannot contend that they did not knowingly violate the Act or that they took practicable precautions, as provided in said Act. *Bowles v. Glick Bros. Lumber Co.*, 146 F. 2d 566 (C. A. 9th).

Long prior to the enactment of the Housing and Rent Act of 1947, the Court in the Fifth Circuit has recognized the importance to effective rent and price control of granting treble damages where wilful overcharges had been established. In *Bowles v. Hasting, supra*, that Court held that treble damages had a deterrent effect upon the violation of the maximum rents:

“When an excess in price is charged the damage is done, and the excess must be repaid, tripled in order to prevent recurrence. * * *” (146 F. 2d at p. 95)

That principle has now been embodied in the Act as it now reads, and this Court should reaffirm it.

The cases above cited were construing Section 205(e) of the Emergency Price Control Act of 1942, as amended, set forth below. That Section and its successor are verbatim in requiring the two-fold defense; they provide in part as follows:

Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 925(e)):	The Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1895):
--	---

“(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a	SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maxi-
--	---

maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however, That* such amount shall be the

maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: "*Provided, That* if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the

amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.
* * *

United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. * * *

By a comparison of the plain language of section 205(e) of the Act of 1942 with Section 205 of the Act of 1947, this Court may readily see that there is no discretion left to the trial court to determine damages between the amount of overcharges and treble damages, where the defendant fails to establish the two-fold defense. The Emergency Price Control Act provided for the exercise of the District Court's discretion to determine whether it wished to increase the amount of the damages upon proof of overcharge. But Section 205 of the Housing and Rent Act makes it mandatory to grant treble damages where the defendant does not sustain his defenses. It provides that the measure of damages is:

“(1) \$50, or (2) three times the amount of the overcharges by which the payment * * * received exceeds the maximum rent which could lawfully be demanded * * *, *whichever in either case may be the greater amount:*” [Emphasis added.]

unless the defendant pleads and proves lack of wilfulness *and* the taking of practicable precautions, in which event the amount of damages is the amount of the overcharges. This is made clear by *Small v. Schultz*, 173 F. 2d 940 (C. A. 7th), where the Court, speaking through Judge Major said (at pp. 943-944):

“Thus, in any event the tenant is entitled to recover as liquidated damage the amount of \$50, but if the trebled amount of the excess payment is greater than the amount of \$50, he is entitled to recover such trebled amount and, in our view, the court has no discretion in that respect in the absence of a defense within the proviso contained in the section. If there be any doubt that the court is without discretion in the absence of such a defense, it is removed by the proviso itself, which states ‘That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation’ (sometimes referred to as the good faith defense). *In other words, in the absence of such defense, the court is required to enter a judgment for treble the amount of the excess payment, and when the court finds that such defense has been made, it is limited to the amount of the overcharge. In either event, no discretion is lodged in the court.*

In this connection, it is pertinent to note that a similar section (Section 205) of the Emergency Price Control Act of 1942 as amended, 50 U. S.

C. A. Appendix, § 925, allowed recovery for an amount ‘not more than three times the amount of the overcharge * * * as the court in its discretion may determine.’ Under that provision this court has held that the allowance of treble damages was discretionary. *Bowles v. Krodel*, 7 Cir., 149 F. 2d 398, 401; *Fleming v. Gordon*, 7 Cir., 161 F. 2d 627, 628. In Section 205 of the instant Act, however, the words ‘not more than’ and ‘as the court in its discretion may determine’ have been omitted. In the instant case, this so-called good faith defense was neither alleged nor proven and the court so found. As a result, we think it was mandatory upon the court to award treble damages for the amount of the overcharge.” (Emphasis added)

This principle was also recently upheld in the case of *United States of America v. The Earl Holding Co., et al.*, No. 3200 (D. C. Minn.), dated February 20, 1950, opinion unreported. In that case, the Court (Judge Nordbye sitting) granted treble damages after the establishment of the overcharges on the ground that “the Court has no alternative but to grant the treble damages sought,”¹⁰ where the defendant failed to prove lack of wilfulness and the taking of practicable precautions.

The defendants here had neglected to prove either mitigating circumstance, and this Court should, therefore, remand the case to the Court below with instructions to enter a judgment for damages.

¹⁰ The opinion in this case is set forth in full in the Appendix (*Infra*, p. 21).

CONCLUSION

It is respectfully submitted that the judgment of the Court below be affirmed and the case be remanded to that Court with directions to enter a judgment for either the amount of the overcharges, or for treble that amount.

ED DUPREE,
General Counsel

LEON J. LIBEU,
Assistant General Counsel

FRANCIS X. RILEY,
Special Litigation Attorney
Office of the Housing Expediter
Washington 25, D. C.

APPENDIX**Rent Procedural Regulation 1 (13 F. R. 2369):***General Provisions*

§ 840.14 *Right to Appeal.* (a) Any landlord subject to any provision of a maximum rent regulation, or of an order issued by a Regional Housing Expediter under § 840.12 (except an order remanding to the Area Rent Director), or of an order entered by an Area Rent Director under section 5 (d) of any maximum rent regulation, or of an order entered by an Area Rent Director under §§ 840.7 or 840.8 (c), may file an appeal in the manner set forth below.

(b) A landlord is subject to a provision of a maximum rent regulation or of an order only if such provision prohibits or requires action by him.

(c) Any appeal filed by a landlord not subject to the provision appealed from, or otherwise not in accordance with the requirements of this part, may be dismissed by the Housing Expediter.

United States District Court, District of Minnesota,

Fourth Division

No. 3200 Civil

UNITED STATES OF AMERICA, *Plaintiff*

v.

THE EARL HOLDING COMPANY AND EARL SIMON,
Defendants

MEMORANDUM DECISION

The above-entitled action came before the Court upon a motion by plaintiff for a temporary injunction to prevent alleged violation of the Rent Control Act of 1947, as amended. 50 U. S. C. A. Appt. Sec. 1881, et seq.

The parties have stipulated to the material facts. In July 1947, a house in Minneapolis was rented under a lease running from September 1, 1947, to September 1, 1948, for a rental price of \$100 per month. Under the lease, the tenant was granted an option to renew the lease for two one-year periods. The tenant exercised the option right, and the lease has been extended to, and is in force until, September 1, 1950. Defendants now own that house and possess the rights and obligations of a landlord under the lease.

The Housing and Rent Act of 1947 was in effect when the lease was executed, and that Act provided that property not rented between February 1, 1945, and January 31, 1947, was exempt from the rent controls imposed under the Act. Consequently, defendants' house was not subject to rent control when the

lease was first executed. For it was rented for the first time in July 1947, effective September 1, 1947.

On March 31, 1949, the Housing and Rent Act of 1947 was amended, and the grounds of exemption for defendants' house from rent control was omitted. Consequently, the house became subject to rent control under the amended Act, and defendants registered their property with the appropriate office. They showed that the rental under the lease was \$100 per month.

On October 27, 1949, the Housing Expediter, pursuant to authority granted to him by the Act, ordered that the rent be lowered from \$100 to \$70 per month, effective November 1, 1949. Defendants refused to accept \$70 from the tenant as rent and informed the tenant that he would be evicted unless he continued to pay the \$100 as required by the lease. The \$100 rental has been paid every month.

Plaintiff now seeks an injunction to enjoin defendants from continuing to collect the \$100 per month rather than \$70, from evicting the tenant in question, and from otherwise violating the Housing and Rent Act of 1949. The parties have agreed that the decision upon this temporary injunction proceeding also can determine the permanent injunction and treble damages questions.

Defendants contend that the lease figure must control because the Expediter's order, which was made after the lease was executed and in operation, seeks to change an existing, operative contract which was valid when made, and that the order therefore violates the guarantees afforded defendants by the due process

clause of the Federal Constitution. The specific legal issue therefore is, Can the terms of a contract in the form of a lease be changed by this legislation which was subsequently enacted?

The question has been answered by the United States Supreme Court by its unanimous decision in the rent control case of *Fleming v. Rhodes*, 331 U. S. 100. In that case the court held, at page 107,

Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired **rights** does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment."

That holding is applicable here. It is not distinguishable merely because valid eviction judgments which were obtained prior to the effective date of the Rent Control Act were objects against which the Rent Act's prohibitions were there enforced. Previously acquired rights were involved just as they are in the instant case. For judgments are a type of previously acquired rights. The Court specifically spoke of such right, and reasoned from a general conclusion concerning them to a specific conclusion that previously acquired judgments could be affected by the Act. At page 107 the court held, "The rights acquired by judgments

have no different standing” from “previously acquired rights.”

And in *Cobleigh v. Woods*, 175 F. 2d 167, cert. den., 337 U. S. 924, the Court of Appeals for the First Circuit specifically applied the rule of the *Rhodes* case to the rent clause of a rental agreement executed between July 1, 1946, and July 25, 1946. During that period rent control did not exist. The previous statute had lapsed. But when the Rent Control Act of 1946 was enacted, it provided that if property had been subject to the previous Rent Control Act, the landlord could not base the rent he thereafter collected upon a rental agreement made between July 1, 1946, and July 25, 1946, even though the agreement was still in effect. The landlord in the *Cobleigh* case claimed that such a prohibition was invalid. The court held unanimously, at page 169,

The constitutional power of Congress so to provide is none the less effective though it may involve prospective modification of existing agreements between landlords and tenants, valid when made. *Fleming v. Rhodes*, 1947, 331 U. S. 100, 107, 67 S. Ct. 1140, 91 L. Ed. 1368; *Taylor v. Brown*, Em. App. 1943, 137 F. 2d 654, 659, certiorari denied, 1943, 320 U. S. 787, 64 S. Ct. 194, 88 L. Ed. 473.

Taylor v. Brown, 137 F. 2d 654, at 659, involved the right under the 1942 Rent Act to “roll back” rents which were set under leases executed before a rent control statute was enacted. The Emergency Court

of Appeals unanimously held that the statute permitting such a "roll back" was valid. The instant case is in principle the same sort of problem. The facts are, by analogy, almost identical. The *Taylor* decision aptly illustrates that defendants' attempt to distinguish the instant case from the *Rhodes* and *Cobleigh* cases upon the theory that the property involved in those cases had once been subject to rent control whereas the house in the instant case never had been subject to control prior to the Rent Act which is now in question, cannot be sustained. And, in any event, the *Rhodes* and *Cobleigh* cases do not turn on the narrow distinction which defendants urge. They turn on the proposition that a right obtained prior to the enactment of a statute can be limited or curtailed by the statute. They are not distinguishable from this case.

Insofar as *Pollack v. Seidman*, 82 N. Y. Supp. 2d 516, upon which defendants rely, is in conflict with this case, it should not be followed. It conflicts with *Woods v. Schmid*, (5 C. A.) 164 F. 2d 981, *Porter v. Merhar*, (6 C. A.) 160 F. 2d 397, *Porter v. Shibe*, (10 C. A.) 158 F. 2d 68, *Woods v. Durr*, (3 C. A.) 176 F. 2d 273, *United States v. Perhownik, et al.*, decided Oct. 14, 1946, Southern District of New York, and *United States v. Hanley*, (N. D. Calif.) decided October 31, 1949. Sound authority and reason dictate that the terms of a contract in the form of a lease can be changed, as plaintiff contends, by legislation subsequently enacted pursuant to constitutional authority. As defendants must recognize, the war powers of Congress are the valid constitutional basis for enactment of the rent control legislation. *Woods v. Miller*, 333

U. S. 138; *Woods v. Durr*, 176 F. 2d 273. Defendants have violated the statute, and upon the facts of this case plaintiff is entitled to the injunction it seeks.

Section 205 of the Housing and Rent Act for 1949 provides that treble damages may be obtained from a landlord who charges more than the maximum rent set by the Expediter unless the overcharge was not willful nor the result of failure to take practicable precautions against the occurrence of such overcharge. The burden of proof is upon the landlord. The evidence here shows that defendants knew of the Expediter's order and knowingly charged rent in excess of the amount specified therein. They did not exhaust their administrative remedies to change the order. They demand the excess amount under threat of eviction. In light of this showing the Court has no alternative but to grant the treble damages sought.

In view of the parties' agreement that the permanent injunction question should be determined by this decision, plaintiff is also entitled to a permanent injunction as prayed.

Plaintiff may present findings of fact, conclusions of law, and order for judgment consistent herewith. An exception is reserved to defendants.

Dated this 20th day of February 1950.

By the Court:

GUNNAR H. NORDBYE,
Judge.

No. 12559

United States
Court of Appeals
for the Ninth Circuit.

MOORE EQUIPMENT CO., INC., a Corporation,
Appellant,

vs.

JOHN O. ENGLAND, as Trustee of the Estates of
Ted E. Fisher and Maxeen R. Fisher, Bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Northern Division.

JUL 24 1950

PAUL P. DISTRICT CLERK

No. 12559

United States
Court of Appeals
for the Ninth Circuit.

MOORE EQUIPMENT CO., INC., a Corporation,
Appellant,

vs.

JOHN O. ENGLAND, as Trustee of the Estates of
Ted E. Fisher and Maxeen R. Fisher, Bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Northern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amendment to Stipulation of Facts.....	14
Answer	5
Certificate of Clerk to Record on Appeal.....	30
Complaint to Recover a Preference.....	2
Designation of Additional Parts of Record..	33
Findings of Fact and Conclusions of Law....	15
Judgment	19
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	28
Notice of Intention to Move for a New Trial..	22
Order Denying Motion for New Trial.....	23
Statement of Points and Designation of Record on Appeal.....	31
Stipulation of Facts.....	9
Stipulation as to Record on Appeal.....	29

NAMES AND ADDRESSES OF ATTORNEYS

SHAPRO AND ROTHSCHILD,

155 Montgomery St.,
San Francisco, Calif.,

Attorneys for Plaintiff.

GILBERT L. JONES,

DANIEL S. LANE,

ROY A. WEAVER,

RICHARD B. DALEY,

351 Wilhoit Bldg.,
Stockton, Calif.,

Attorneys for Defendant.

In the Northern Division of the United States
District Court for the Northern District of
California

No. 6174, Civil Action

JOHN O. ENGLAND, as Trustee of the Estates of
TED E. FISHER and MAXEEN R. FISHER,
Bankrupts,

Plaintiff,

vs.

MOORE EQUIPMENT CO., INC., a Corporation,
Defendant.

COMPLAINT TO RECOVER A PREFERENCE

Plaintiff complains of Defendant and for cause
of action alleges:

I.

That on the 25th day of May, 1948, Ted E. Fisher and Maxeen R. Fisher filed their Voluntary Petitions in Bankruptcy with the Clerk of the above-entitled Court, and that thereafter, and after proceedings duly and regularly had, said Ted E. Fisher and Maxeen R. Fisher were adjudged bankrupts and the proceedings with reference to the administration of their estates were referred to Hon. Evan J. Hughes, one of the Referees in Bankruptcy of the above-entitled Court.

II.

That thereafter, at a first meeting of creditors of the estates of each of said Bankrupts, held before

said Referee in Bankruptcy, Plaintiff was elected Trustee of the estates of each of said Bankrupts, qualified as such Trustee by filing the bonds in the penal sum set by the Court, and ever since has been and now is the duly elected, qualified and acting Trustee of the estates of said Ted E. Fisher and of said Maxeen R. Fisher; that the proceedings in the matter of the administration of the estate of Maxeen R. Fisher were consolidated by order of the above-entitled Court with the proceedings in the matter of Ted E. Fisher.

III.

That during all of the times herein mentioned, Moore Equipment Co., Inc., was and is a corporation organized and existing by virtue of the laws of the State of California and maintaining its principal place of business in the County of San Joaquin, said State.

IV.

That heretofore and on or about the 8th day of April, 1948, and within four months of the filing of said Petition in Bankruptcy, and while said Bankrupts were insolvent, Defendant took possession of a certain Allis-Chalmers "W" Speed Control, Serial No. 1E2191 which was then the property of said Bankrupts in full and/or partial satisfaction of a general unsecured antecedent indebtedness then due by said Bankrupts to Defendant.

V.

That said Bankrupts had executed a Chattel Mortgage to said Moore Equipment Company covering

said equipment described in paragraph IV, but that said mortgage was invalid as against your Plaintiff in that the same was not recorded in the County of Stanislaus, the county in which said equipment was located for a period in excess of thirty days.

VI.

That at the time of the execution of the said Chattel Mortgage and at the time of the taking possession of said equipment there were other general unsecured creditors of said Bankrupts of the same class as Defendant who still are creditors of said Bankrupts and who have filed claims in said bankruptcy proceedings. That there are insufficient funds in the hands of Plaintiff to pay the claims of the creditors of said Bankrupts in full.

VII.

That at the time of the receipt of the hereinabove described personal property by Defendant, Defendant knew, or had reasonable cause to believe that said Bankrupts were insolvent.

VIII.

That Plaintiff has no information or belief as to whether said equipment is still in the possession of Defendant, but Plaintiff is informed and believes and therefore alleges that the said equipment more particularly described in paragraph IV hereinabove was worth at the time of the repossession thereof the sum of Two Thousand Three Hundred Six and 25/100 (\$2,306.25) Dollars.

IX.

That on the 22nd day of June, 1948, Plaintiff demanded of Defendant the return of said preference but that Defendant has failed, refused and neglected to comply with said demand.

Wherefore Plaintiff, as such Trustee, prays judgment against Defendant in the sum of Two Thousand Three Hundred Six and 25/100 (\$2,306.25) Dollars, together with interest thereon at the rate of 7% per annum from the 22nd day of June, 1948, to the date of payment, and for Plaintiff's costs and disbursements incurred herein and for such further and other order as may be just and proper in the premises.

SHAPRO & ROTHSCCHILD,

By /s/ AUGUST B. ROTHSCCHILD,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed May 12, 1949.

[Title of District Court and Cause.]

ANSWER

Comes Now, Defendant Moore Equipment Co., Inc., a corporation, and in answer to Plaintiff's complaint, admits, denies and avers as follows, to wit:

First Defense

I.

The complaint herein fails to state a claim against this Defendant upon which relief can be granted.

Second Defense

I.

Defendant admits the allegations of Paragraphs I, II, III and X of said complaint; admits that portion of Paragraph IV alleging that it took possession of a certain Allis-Chalmers "W" Speed Control, Serial No. 1E2191; admits that the Bankrupt, Ted E. Fisher, had executed a chattel mortgage to secure said property and that the same was not recorded in Stanislaus County as alleged in Paragraph V; alleges that it is without knowledge or information as to the truth of the allegations contained in Paragraph VI; denies each and every other allegation contained in the complaint.

Third Defense

I.

On February 26th, 1948, the Bankrupt, Ted E. Fisher, purchased from Defendant an Allis-Chalmers WC Road Grader, Serial Number 1E2191; that upon making said purchase, the said bankrupt made and delivered his promissory note to Defendant in the total principal sum of Fourteen thousand nine hundred sixty-five and 68/100ths (\$14,965.68) Dollars, which sum included the full purchase price of the described equipment, together with other indebtedness owed to Defendant by the said Bankrupt; said note by its term was payable in installments at the rate of Three thousand and no/100ths (\$3,000.00) Dollars on April 1st, 1948,

and Nine hundred ninety-seven and 14/100ths (\$997.14) Dollars per month on the 1st day of each month thereafter for twelve (12) successive months; that on said date, said Bankrupt made and executed a chattel Mortgage to this Defendant, mortgaging said Allis-Chalmers road grader and other property to secure the payment of said promissory note.

II.

Said chattel mortgage provided in part that the equipment so mortgaged was to be permantly located and garaged at Manteca, California, and that the said Bankrupt resided in Manteca, California; that Manteca, California, is located in San Joaquin County, State of California; that said mortgage, being Instrument Number 6314, was recorded in the Office of the County Recorder in and for said County and State at 10:05 o'clock a.m. on February 28th, 1948, in Volume 1113 of Official Records, page 154.

III.

That the said Bankrupt, as such mortgagor, voluntarily removed and permitted the removal of the mortgaged property from San Joaquin County, California, to Stanislaus County, California; that on April 8th, 1948, and prior to the date of the filing of the voluntary petition in bankruptcy, Defendant, for the purpose of foreclosing its lien created by said chattel mortgage, took possession of said property in Stanislaus County; that under and pursuant to the laws of the State of California, the Defendant, at the time of said

repossession, had a valid and subsisting lien on said property, which dated from the date of the execution of said mortgage, which lien was superior to the claim of general unsecured creditors of said Bankrupt and was superior to any claim of Plaintiff herein.

IV.

That at the time Defendant repossessed said property, the said Bankrupt was in default in payment of the installments due and payable by the terms of said note; that upon taking possession and by virtue of the power of sale contained in said mortgage, and in accordance therewith, Defendant sold said property at private sale; that the said repossession and said sale did not constitute a preference within the meaning of the Bankruptcy Act.

Wherefore, Defendant prays that Plaintiff take nothing by reason of his complaint; that said complaint be dismissed and that this Defendant have judgment for its costs herein incurred, and for such other and further relief as may be proper.

GILBERT L. JONES,
DANIEL S. LANE,
ROY A. WEAVER and
RICHARD B. DALEY,

By /s/ ROY A. WEAVER,
Attorneys for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 30, 1949.

[Title of District Court and Cause.]

STIPULATION OF FACTS

The parties to the above-entitled action, by their respective attorneys, agree upon the following statement of the facts in said action, and submit the same to the Court as true.

I.

That on the 25th day of May, 1948, Ted E. Fisher and Maxeen R. Fisher filed their Voluntary Petitions in Bankruptcy with the Clerk of the above-entitled Court, and that thereafter, and after proceedings duly and regularly had, said Ted E. Fisher and Maxeen R. Fisher were adjudged bankrupts and the proceedings with reference to the administration of their estates were referred to Hon. Evan J. Hughes, one of the Referees in Bankruptcy of the above-entitled Court.

II.

That thereafter, at a first meeting of creditors of the estates of each of said Bankrupts, held before said Referee in Bankruptcy, Plaintiff was elected Trustee of the estates of each of said Bankrupts, qualified as such Trustee by filing the bonds in penal sum set by the Court, and ever since has been and now is the duly elected, qualified and acting Trustee of the estates of said Ted E. Fisher and of said Maxeen R. Fisher: that the proceedings in the matter of the administration of the estates of Maxeen R. Fisher were consolidated by order of the

above-entitled Court with the proceedings in the matter of Ted E. Fisher.

III.

That during all of the times herein mentioned, Moore Equipment Co., Inc., was and is a corporation organized and existing by virtue of the laws of the State of California and maintaining its principal place of business in the County of San Joaquin, said State.

IV.

On February 26th, 1948, the Bankrupt, Ted E. Fisher, purchased from Defendant an Allis-Chalmers WC Road Grader, Serial Number 1E2191; that upon making said purchase, the said bankrupt made and delivered his promissory note to Defendant in the total principal sum of Fourteen thousand nine hundred sixty-five and 68/100ths (\$14,965.68) Dollars, which sum included the full purchase price of the described equipment, together with other indebtedness owed to Defendant by the said Bankrupt; said note by its term was payable in installments at the rate of Three thousand and no/100ths (\$3,000.00) Dollars on April 1st, 1948, and Nine hundred ninety-seven and 14/100ths (\$997.14) Dollars per month on the 1st day of each month thereafter for twelve (12) successive months; that on said date, said Bankrupt made and executed a chattel mortgage to this Defendant, mortgaging said Allis-Chalmers road grader and other property to secure payment of said promissory note.

V.

Said Chattel mortgage provided in part that the equipment so mortgaged was to be permanently located and garaged at Manteca, California, and that the said Bankrupt resided in Manteca, California; and that Manteca, California, is located in San Joaquin County, State of California; that said mortgage, being Instrument No. 6314, was recorded in the Office of the County Recorder in and for County and State at 10:05 o'clock a.m. on February 28th, 1948, in Volme 1113 of Official Records, page 154.

VI.

That after the execution of said Chattel Mortgage, aforesaid, the said Bankrupt, as said Mortgagor, voluntarily removed and permitted the removal of the said mortgaged property from San Joaquin County, State of California, to Stanislaus County, California; that said mortgaged property remained in Stanislaus County for more than thirty days; that the aforesaid chattel mortgage was not recorded in Stanislaus County; that on April 8, 1948, within four months from the filing of the aforesaid Petition in Bankruptcy, Defendant took possession of said mortgaged property in Stanislaus County.

VII.

That at the time Defendant repossessed said property the said Bankrupt was in default in payment of the installment due and payable by the terms of said note; that after taking possession, and by virtue of the power of sale contained in said chattel mortgage,

and in accordance therewith, Defendant sold said property at private sale; that said sale was made on May 1, 1948, to a bona fide purchaser for value.

VIII.

That at the time of the taking possession of said equipment there were general unsecured creditors of said Bankrupt, who have filed claims in said bankruptcy proceeding; that there are not sufficient funds in the hands of the Plaintiff to pay the claims of said bankruptcy in full.

IX.

That at the time that Defendant repossessed the said above-described property, as aforesaid, said Defendant had reasonable cause to believe that on said date the said Bankrupt was insolvent.

X.

That at the time of the repossession of said equipment, it was worth the sum of One Thousand Eight Hundred Sixty and 00/100 (\$1,860.00) Dollars.

XI.

That on the 22nd day of June, 1948, Plaintiff demanded of Defendant the return of said property, but that the Defendant has refused to comply with said demand.

SHAPRO & ROTHSCHILD,

By /s/ RAYMOND B. ANIXTER,
Attorneys for Plaintiff.

GILBERT L. JONES,
DANIEL S. LANE,
ROY A. WEAVER and
RICHARD B. DALEY,

By */s/* DANIEL S. LANE,
Attorneys for Defendant.

[Endorsed]: Filed October 11, 1949.

[Title of District Court and Cause.]

AMENDMENT TO STIPULATION OF FACTS

The Stipulation of Facts heretofore filed in the above titled action by the Attorneys for the respective parties thereto is hereby amended in the following particulars, to wit: Paragraph IX of said Stipulation is hereby amended to read as follows:

IX.

That at the time that Defendant repossessed the said above-described property as aforesaid, said Bankrupt was insolvent and said Defendant had reasonable cause to believe that on said date the said Bankrupt was insolvent.

In all other respects the aforesaid Stipulation of Facts shall remain as heretofore filed.

SHAPRO & ROTHSCHILD,

By /s/ RAYMOND T. ANIXTER,
Attorneys for Plaintiff.

GILBERT L. JONES,

DANIEL S. LANE,

ROY A. WEAVER and

RICHARD B. DALEY,

By /s/ DANIEL S. LANE,
Attorneys for Defendant.

[Endorsed]: Filed January 16, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for pre-trial conference on the 1st day of September, 1949; that it was thereupon stipulated that said cause may be submitted upon an agreed Stipulation of Facts and the above-entitled Court thereupon made its Order, submitting said cause upon the filing of an agreed Stipulation of Facts; that, thereafter a Stipulation of Facts was duly filed herein, and, subsequently thereto an amendment to Stipulation of Facts was duly filed herein; and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its findings of fact as follows:

Findings of Fact

1. That the allegations contained in Paragraph I of Plaintiff's complaint are true.
2. That the allegations contained in Paragraph II of Plaintiff's complaint are true.
3. That the allegations contained in Paragraph III of Plaintiff's complaint are true.
4. That on the 26th day of February, 1948, the Bankrupt, Ted E. Fisher, purchased from Defendant an Allis Chalmers W. C. Road Grader, Serial No. 1E2191; that upon making said purchase, the said Bankrupt made and delivered his Promissory Note to Defendant in the total principal sum of

\$14,965.68, which sum included the full purchase price of the described equipment, together with other indebtedness owed to Defendant by the said Bankrupt; that said note, by its terms, was payable in installments at the rate of \$3,000.00 on April 1, 1948, and \$997.14 per month on the 1st day of each month thereafter for twelve successive months; that on said day, said Bankrupt made and executed a Chattel Mortgage to said Defendant, mortgaging said Allis Chalmers Road Grader and other property to secure the payment of said note. Said Chattel mortgage provided in part that the equipment so mortgaged was to be permanently located and garaged at Manteca, California; and that the said Bankrupt resided in Manteca, California; and that Manteca, California, is located in San Joaquin County, State of California; that said mortgage, being Instrument No. 6314, was recorded in the Office of the County Recorder in and for said county and state at 10:05 o'clock a.m. on February 28th, 1948, in Volume 1113 of Official Records, page 154.

5. That the allegations of Paragraph IV of Plaintiff's complaint are true.

6. That after the execution of the aforesaid Chattel Mortgage, the said Bankrupt, as said Mortgagor, voluntarily removed and permitted the removal of the said mortgaged property from San Joaquin County, State of California, to Stanislaus County, California; that said mortgaged property remained in Stanislaus County for more than 30 days; that the aforesaid Chattel Mortgage was not recorded in Stanislaus County; that on April 8, 1949, within

four months from the filing of the aforesaid Petition in Bankruptcy, Defendant took possession of said mortgaged property in Stanislaus County; and that after taking possession, and by virtue of the power of sale contained in said Chattel Mortgage, and in accordance therewith, Defendant sold said property at private sale to a bona fide purchaser for value. That said sale was made on May 1st, 1948, to a bona fide purchaser for value; that at the time Defendant repossessed said property, the said Bankrupt was in default in payment of the installment due and payable by the terms of said note.

7. That all of the allegations contained in Paragraph VI of Plaintiff's complaint are true.

8. That at the time that Defendant repossessed the said above-described property as aforesaid, said Bankrupt was insolvent and said Defendant had reasonable cause to believe that on said date the said Bankrupt was insolvent.

9. That at the time of the repossession of said equipment, as aforesaid, it was worth the sum of \$1,860.00.

10. That all of the allegations contained in Paragraph IX of Plaintiff's complaint are true.

11. That the allegations contained in Defendant's first defense are untrue.

12. That the allegations contained in Paragraph III of Defendant's third defense commencing with the words on page 3, line 11 and reading as follows, towit: " * * * the Defendant, at the time of said

repossession had a valid and subsisting lien on said property, which dated from the date of the execution of said mortgage, which lien was superior to the claim of general unsecured creditors of said Bankrupt and was superior to any claim of Plaintiff herein," are untrue.

13. That the allegations contained in Paragraph 4 of Defendant's third defense commencing on page 3, line 23 and reading as follows, to wit: "that the said repossession and said sale did not constitute a preference within the meaning of the Bankruptcy Act," are untrue.

From the foregoing facts, the Court concludes:

Conclusions of Law

1. That at the time of the taking of possession of the personal property purported to be secured by the Chattel Mortgage, on the 8th day of April, 1948, Defendant was an unsecured general creditor and, by such repossession, obtained a voidable preference, in accordance with the provisions of Section 60B of the Acts of Congress relating to Bankruptcy, over other general unsecured creditors of the said Bankrupt Ted Fisher.

2. That at the time of the taking possession of said personal property by Defendant, the Chattel Mortgage securing said property was invalid as against the creditors of the Bankrupt, Ted Fisher.

3. That at the time of the taking of possession by Defendant of the said personal property as afore-

said on the 8th day of April, 1948, the personal property secured by said Chattel Mortgage was exempted from the operation of said mortgage, as against the creditors of the Bankrupt, Ted Fisher.

4. That Plaintiff is entitled to judgment in the sum of \$1,860.00, the stipulated value of the personal property repossessed, at the time of the repossession, together with interest at the rate of 7% per annum from the 22nd day of June, 1948, to the date of payment, and for Plaintiff's costs and disbursements incurred herein.

Let Judgment be entered accordingly.

Dated: This 15th day of February, 1950.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed February 15, 1950.

In the Northern Division of the United States
District Court for the Northern District of
California

No. 6174 Civil Action

JOHN O. ENGLAND, as Trustee of the Estates of
TED E. FISHER and MAXEEN R. FISHER,
Bankrupts,

Plaintiff,

vs.

MOORE EQUIPMENT CO., INC., a Corporation,
Defendant.

JUDGMENT

This cause came on regularly for pre-trial before

the Court, sitting without a jury, on the first day of September, 1949, Messrs. Shapro & Rothschild by Raymond T. Anixter, Esq., appeared as Attorneys for Plaintiff and Gilbert L. Jones, Daniel S. Lane and Roy A. Weaver by Daniel S. Lane, Esq., appeared as Attorneys for Defendant, and the Court having ordered the matter to be submitted upon the filing of an agreed Stipulation of Facts, and said agreed Stipulation of Facts having been thereafter duly filed and said cause having been duly submitted, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law and having directed that Judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid;

It Is Hereby Ordered, Adjudged and Decreed that the transfer of possession to the Defendant of that certain Allis-Chalmers W. C. Road Grader described in Plaintiff's complaint on the 8th day of April, 1948, within 4 months of the date of the filing of the Petition in Bankruptcy by the Bankrupt Ted E. Fisher, be and is hereby vacated and annulled as a voidable preference under the provisions of Section 60B of the Acts of Congress relating to Bankruptcy.

It Is Further Ordered, Adjudged and Decreed that Plaintiff do have and recover from the Defendant, Moore Equipment Co., Inc., a Corporation, the sum of \$1,860.00 as the value of the aforesaid personal property, together with interest on said sum

at the rate of 7% per annum from the 22nd day of June, 1948, until the date of payment.

It Is Further Ordered, Adjudged and Decreed that Plaintiff above-named do have and recover from and of the Defendant above-named for its Court costs herein incurred and to be hereafter taxed as such herein, the sum of \$.....

Dated at Sacramento, California, in this District, this 15th day of February, 1950.

/s/ DAL M. LEMMON,
District Judge.

Entered in Civil Docket Feb. 16, 1950.

C. W. CALBREATH,
Clerk.

By /s/ C. C. EVANSEN,
Deputy Clerk.

Lodged January 31, 1950.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE
FOR A NEW TRIAL

To John O. England, as Trustee of the Estates of Ted E. Fisher and Maxeen R. Fisher, Bankrupts, Plaintiff above-named, and to Shapro & Rothschild, his Attorney:

You, and Each of You, Will Please Take Notice that on the 13th day of March, 1950, at 10:00 o'clock a.m. of said day, at the Courtroom of the United States District Court, New Post Office Building, Sacramento, California, the Defendant above-named intends to move the above-entitled Court to vacate and set aside the decision of the Court rendered in the above-entitled action, and to grant a new trial of said cause upon the following grounds materially affecting the substantial rights of said Defendant, to wit:

1. Insufficiency of the evidence to justify the decision.
2. That the decision is against and contrary to the law and the facts.
3. That the learned Court erred in entering judgment for the Plaintiff.

Said motion, with regard to each and all of the above-mentioned grounds, will be made upon the minutes of the Court and upon the records and files

in the above-entitled action and upon this Notice of Intention to Move for a New Trial.

Dated: This 21st day of February, 1950.

JONES, LANE & WEAVER,
Attorneys for Defendant.

[Endorsed]: Filed February 23, 1950.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
NEW TRIAL

The validity of the mortgage in controversy has not been attacked up to the time the property, the subject of the mortgage, was removed from San Joaquin County to Stanislaus County. The mortgage appears to have conformed to the law and was a valid and subsisting lien upon the personal property up to that time. At the time the mortgage was executed and recorded the property was located in San Joaquin County. It was later moved to Stanislaus County and remained there more than 30 days, following which the property was taken by the mortgagee on April 8, 1948, and sold by it at private sale on May 1, 1948. The mortgage was never recorded in Stanislaus County, the county in which the property remained after it was removed thereto and up until the time of sale.

At common law delivery to and possession by the mortgagee of a mortgaged chattel was required.

This has become changed by statute in California and recordation has been substituted for delivery and possession. *Ruggles v. Cannedy*, 127 Cal. 290, 297. The authority for the creation of a chattel mortgage in this state derives its source from the statutory enactments and all rights accruing by virtue of such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions. *Hopper v. Keys*, 152 Cal. 488.

Section 3440 of the Civil Code of the State of California was designed to prevent secret liens upon and secret transfers of personal property and requires in order to effect a transfer of personal property that there be an immediate delivery and continued change in possession, without which the transfer is void as to creditors and as to purchasers and encumbrancers in good faith. Mortgages allowed by law are exempted therefrom. Mortgages not executed and recorded as provided by law are subject to the penalty provided under Section 3440. *Ruggles v. Cannedy*, *supra*.

There is presented to the Court the question as to whether or not the mortgage, though valid in its inception, was no longer in existence at the time of the private sale above-mentioned.

The conditions which must be complied with in the creation of a valid lien upon personal property are found in Section 2957 of the Civil Code. Among other requirements enumerated therein are those for recording of mortgages of property, such as here

involved, in the offices of the recorder of the county where the property is located, of the county where the mortgagor resides at the time the mortgage is executed and "in the county to which such property is thereafter removed."

Section 2965 of the Civil Code provides that if mortgaged personal property, such as the property here under consideration, is removed from the county in which it is situated, the lien or mortgage shall not be effected by such removal for a period of 30 days after such removal, but that, after the expiration of the 30 days, the property is exempted from the operation of the mortgage, except as between the parties thereto, until either:

1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

2. The mortgagee takes possession of the property as prescribed in the next section.

The next section (Section 2966) provides: "If the mortgagor voluntarily removes or permits the removal of the mortgaged property * * * from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due."

Other sections provide the procedure for sale under pledges. It is agreed that these provisions were not substantially or at all complied with and that the sale was not had as required and provided by these sections. It is the mortgagee's contention

that upon taking possession of the property, after the 30 day period, the mortgage and all of its provisions were revived and consequently he was empowered to sell under the terms and provisions of the mortgage and was not limited to foreclose as provided in the Sections dealing with pledges.

As has been shown, personal property mortgages exist and have their basis under the Civil Code provisions. If the position taken by the mortgagee is correct the concluding clause of Section 2965 reading "as prescribed in the next section" is meaningless and has no bearing upon the rights of the parties or upon the status of the mortgage. No California case has been called to my attention which decides the question.

With defendant's contention I do not agree. The sections above-mentioned are in para materia. If a mortgage does not conform to the provisions of the statute as to execution and recordation it is of no validity as against creditors. The words above-quoted point to the nature of the possession required in order to revive the mortgage. They are words of qualification. It is not mere possession which satisfies the statute but possession as prescribed by Section 2965, namely for the purpose and to the end of selling the property "as a pledge for the payment of the debt." The possession which the mortgagee obtained was not for that purpose but for the purpose of sale under the terms of the mortgage.

The interpretation of these related code sections is to be had in the light of the legislative intention.

The intent to use meaningless or purposeless words should not be indulged in. *French v. Teschemaker*, 24 Cal. 518, 557. Words should never be considered unnecessary and surplusage if a reasonable construction can be adopted which will give force to and preserve all of the terms of the statute. *Peo v. Perkins*, 85 Cal. 509; *Gates v. Salmon*, 35 Cal. 576; *Langenour v. French*, 34 Cal. 92; *Edwards v. Sweigert*, 15 Cal. App. 503; *Rumetsch v. Oakland*, 135 Cal. App. 267; *Davidson v. Burns*, 38 Cal. App. 2d 188; *Los Angeles Co. v. Emme*, 42 Cal. App. 2d. 239. Effect should be given to every part of these code sections, if such is possible, to the end that the different provisions are harmonized. Had the legislature intended the result for which defendant contends it had only to omit the clause above-mentioned and it would thereby clearly have effected that end. It is the duty of the Court to give effect not only to a statute or code section as a whole but to each and every part thereof—i.e., to every word and clause, and certainly to every distinct or co-ordinate provision or section. 23 Cal. Jur. 758.

It would seem to me that since the property was exempted from the operation of the mortgage it could be only revived by either of the two methods mentioned in Section 2965. Since the mortgage was not recorded in the county to which the property was removed and since it was not possessed for the purpose of sale as a pledge in order to satisfy the debt the sale had was contrary to the statute and amounted to a conversion of the property mortgaged.

The mortgagee at the time of sale was in the same position as a mortgagee in possession under an unrecorded chattel mortgage. *Loosemore v. Baker*, 175 Cal. 420; *Chelhar v. Acme Garage*, 18 Cal. App. 2d 775. Defendant received a preference within the four months period. This is voidable at the instance of the trustee in bankruptcy. *Noyes v. Bank of Italy*, 206 Cal. 266.

The motion for a new trial is denied.

Dated: March 24, 1950.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed March 24, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73(b)

Notice Is Hereby Given that Moore Equipment Co., Inc., a Corporation, Defendant above-named, hereby appeals to the Court of Appeals for the 9th Circuit from the final judgment entered in this action on February 16th, 1950, and from the whole thereof.

Dated: This 20th day of April, 1950.

/s/ DANIEL S. LANE,
Attorney for Appellant.

[Endorsed]: Filed April 21, 1950.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

The parties to the above-entitled action, by their respective attorneys hereby stipulate and agree that the following documents may be designated as the contents of record on appeal pursuant to rule 75a.

1. Complaint filed herein by Plaintiff.
2. Answer of Defendant.
3. Stipulation of Facts.
4. Amendment to Stipulation of Facts.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Intention to Move for New Trial.
8. Order Denying Motion for New Trial.
9. Notice of Appeal.
10. Stipulation as to Record on Appeal.

SHAPRO & ROTHSCHILD,

By /s/ RAYMOND T. ANIXTER,
Attorneys for Plaintiff.

JONES, LANE & WEAVER,

By /s/ DANIEL S. LANE,
Attorneys for Defendant.

[Endorsed]: Filed May 26, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

Complaint,
Answer of defendant,
Stipulation of facts,
Amendment to stipulation of facts,
Finding of fact and conclusions of law,
Judgment,
Notice of intention to move for a new trial,
Order denying motion for a new trial,
Notice of appeal,
Stipulation as to record on appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 26th day of May, 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 12559. United States Court of Appeals for the Ninth Circuit. Moore Equipment Co., Inc., a corporation, Appellant, vs. John O. England, as Trustee of the Estates of Ted E. Fisher and Maxeen R. Fisher, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed May 29, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals,
Ninth Circuit

Civil Action No. 12559

MOORE EQUIPMENT CO., INC., a Corporation,
Appellant-Defendant,

vs.

JOHN O. ENGLAND, as Trustee of the Estates of
TED E. FISHER and MAXEEN R. FISHER,
Bankrupts,

Appellee-Plaintiff.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD ON APPEAL

Appellant sets forth the following points on which he intends to rely on Appeal:

I.

The Court erred in finding that Appellant was an unsecured creditor at the time that it repossessed the mortgaged personal property.

II.

The Court erred in finding that Appellant's repossession of the mortgaged personal property constituted a voidable preference under Section 60B of the Acts of Congress relating to Bankruptcy.

III.

The Court erred in its construction of Sections 2965 and 2966 of the Civil Code of the State of California in holding that Appellant did not re-establish a pre-existing valid lien by its act of taking possession of mortgaged personal property voluntarily removed by the mortgagor from the county of his residence.

Appellant further sets forth the following as a designation of all of the record which is material to the consideration of the Appeal:

1. Complaint.
2. Answer.
3. Stipulation of Facts.
4. Amendment to Stipulation of Facts.
5. Findings of Fact and Conclusions of Law.

6. Judgment.

Notice of Appeal.

Clerk's Certificate.

/s/ DANIEL S. LANE,

Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed June 19, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL
PARTS OF RECORD

Appellee sets forth herein a designation of additional parts of the record which he believes is material to the consideration of the appeal:

I.

Appellee believes that in addition to the portions of the record designated by Appellant that the following portion of the record is material to the consideration of the appeal:

1. Notice of intention to move for a new trial.
2. Order denying motion for a new trial.
3. Notice of appeal.
4. Stipulation as to record on appeal.

SHAPRO & ROTHCHILD.

By /s/ RAYMOND T. ANIXTER,

Attorneys for Appellee.

Affidavit of service by mail attached.

[Endorsed]: Filed June 15, 1950.

No. 12,559

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MOORE EQUIPMENT Co., INC. (a corporation),

Appellant,

vs.

JOHN O. ENGLAND, as Trustee of the
Estate of Ted E. Fisher and Maxine
R. Fisher, Bankrupt,

Appellee.

**Appeal from the United States District Court, Northern
District of California, Northern Division.**

APPELLANT'S OPENING BRIEF.

DANIEL S. LANE,

351 Wilhoit Building, Stockton 2, California,

Attorney for Appellant.

JONES, LANE & WEAVER,

351 Wilhoit Building, Stockton 2, California,

Of Counsel.

FILED

1957

PAUL P. GIBBON

Subject Index

	Page
Statement of facts	1
Specification of error in findings of fact and conclusions of law	3
Preliminary analysis	4
Argument	5
I. Appellant's chattel mortgage prior to the removal of the mortgaged property to another county, was a valid subsisting lien against the mortgaged equipment.....	5
II. The removal by the mortgagor of the mortgaged property, and its location in the county of removal for more than thirty days suspended the pre-existing valid lien	6
III. The pre-existing valid lien was re-established by the mortgagee taking possession	8
Conclusion	11

Table of Authorities Cited

Cases	Pages
American Nat. Bank v. Harris (Okla.), 84 F. (2d) 181, 31 A.B.R. (N.S.) 417	4
Bank v. Sampsell, 114 F. (2d) 211	4
Chelhar v. Acme Garage, 18 C. A. (2d) (Sup.) 775, 61 P. (2d) 1232	4
Dohrman v. Durstow, 90 C. A. (2d) 236, 202 P. (2d) 607..	10
Hopper v. Keys, 152 Cal. 488, 92 Pac. 1017.....	7
Mason v. Wylde, 308 Mass. 268, 32 N. E. (2d) 615.....	4
Noyes v. Bank of Italy, 206 Cal. 266, 274 Pac. 268.....	4
Pacific Fruit Exchange v. Booth Co., 103 Cal. App. 54, 283 Pac. 944	7
Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11.....	4

Statutes

Bankruptcy Act, Section 60B	3
Civil Code:	
Section 2957	5
Section 2965	3, 5, 6, 7, 9, 11
Section 2966	3, 5, 6, 7, 9, 10, 11
Statutes 1909, page 44	7
Statutes 1923, page 139	7
Statutes 1935, page 2227	7

Texts

103 A.L.R. 198, Annotation—Chattel Mortgage—Removed Property	6
16 California Law Review, pages 135, 137	8
Jones—Chattel Mortgages and Conditional Sales, Par. 260, Vol. 1, page 434	6

No. 12,559

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MOORE EQUIPMENT Co., INC. (a corporation),

Appellant,

vs.

JOHN O. ENGLAND, as Trustee of the
Estate of Ted E. Fisher and Maxine
R. Fisher, Bankrupt,

Appellee.

Appeal from the United States District Court, Northern
District of California, Northern Division.

APPELLANT'S OPENING BRIEF.

STATEMENT OF FACTS.

The facts are undisputed and were stipulated to by the parties in District Court.

On May 25, 1948, Ted E. Fisher, hereinafter referred to as the Bankrupt, and Maxine R. Fisher, his wife, filed their voluntary petition in bankruptcy. Thereafter, John O. England was appointed trustee.

Prior to filing his petition and on February 26, 1948, the Bankrupt purchased from Moore Equipment

Co., Inc., a California corporation, maintaining its principal place of business in San Joaquin County, an Allis-Chalmers WC road grader. The Bankrupt executed a promissory note in the sum of \$14,965.68 in payment of the full purchase price of the grader and in part payment of other equipment, not material herein. The note was payable in installments at the rate of \$3,000.00 on April 1, 1948 and \$997.14 per month on the first day of each month thereafter for twelve successive months. As security for the payment of this note, the Bankrupt made and executed a chattel mortgage to the corporation on the road grader and other equipment.

The chattel mortgage provided in part that the mortgaged equipment was to be permanently located and garaged in Manteca, San Joaquin County, California, and provided further that the Bankrupt resided at that place. The Mortgage was recorded in the office of the County Recorder in and for San Joaquin County on February 28, 1948.

After the execution of the chattel mortgage and more than thirty days prior to April 8, 1948, the Bankrupt voluntarily removed the mortgaged property from San Joaquin County, California, to Stanislaus County, California. The property remained in Stanislaus County more than thirty days after the removal.

On April 8, 1948, defendant repossessed the road grader in Stanislaus County. At the time of repossession, the Bankrupt was in default in payment of the installment due and payable by the terms of the note.

After taking possession, and by virtue of the power of sale contained in said chattel mortgage, and in accordance therewith, Moore Equipment Co. sold the grader at private sale on May 1, 1948, to a bona fide purchaser for value. The chattel mortgage was not recorded in Stanislaus County at any time. The property was not disposed of as a pledge.

The value of the property at the time of sale was the sum of \$1,860.

The District Court held that appellant obtained a preference under Section 60B of the Bankruptcy Act when it repossessed the grader under Section 2965 of the Civil Code of the State of California, because it did not dispose of the grader as a pledge pursuant to Section 2966 of the Civil Code of the State of California.

**SPECIFICATIONS OF ERROR IN FINDINGS OF FACT
AND CONCLUSIONS OF LAW.**

Findings of fact numbered 10, 11, 12 and 13 are specified as error. These findings are alleged to be erroneous by reason of the fact that the same are conclusions of law, inconsistent with the facts stipulated by the parties.

Conclusions of law numbered 1, 2, 3 and 4 are specified as error for the reason that the same are unsupported by the facts stipulated to by the parties and found by the Court.

PRELIMINARY ANALYSIS.

This case involves the right of a mortgagee under a purchase money mortgage to repossess non-automotive personal property when the property has been removed from the county in which the mortgagor resided and the property was situated at the time of the delivery of the purchase money mortgage. There is a square conflict in the decisions as to whether or not a preference ever results where the mortgagee repossesses prior to actual bankruptcy, even where the mortgage is void for lack of compliance with state statute. Under the Massachusetts rule,¹ a mortgagee under a mortgage void for lack of recording may repossess prior to bankruptcy without effecting a preference, on the theory that the mortgage is valid between the parties. Under the New York rule, the mortgagee does not validate an invalid lien by the mere act of taking possession.² California follows the New York rule. Thus, a mortgagee does not acquire any rights by taking possession where a mortgage is void for lack of due execution, failure to record or delay in recording.³

In instant case, we are dealing with a mortgage which created a valid lien and the mortgaged property

¹*Mason v. Wylde*, 308 Mass. 268, 32 N.E. (2d) 615; certiorari denied, 62 Supreme Court 74, 314 U.S. 638;
American Nat. Bank v. Harris (Okla.), 84 F. (2d) 181, 31 A.B.R. (N.S.) 417.

²*Stephens v. Perrine*, 143 N.Y. 476, 39 N.E. 11.

³*Noyes v. Bank of Italy*, 206 Cal. 266, 274 P. 268;

Chelhar v. Acme Garage, 18 C. A. (2d) (Sup.) 775, 61 P. (2d) 1232;

Bank v. Sampsell, 114 F. (2d) 211.

was thereafter removed to another county. The facts being undisputed, a single question of law is presented for determination. Did appellant re-establish a pre-existing valid lien by taking possession of the mortgaged property pursuant to Sections 2965 and 2966 of the Civil Code of the State of California? If in fact the lien was re-established, appellant was a secured creditor with a paramount lien and no preference could result.

ARGUMENT.

I.

APPELLANT'S CHATTEL MORTGAGE, PRIOR TO THE REMOVAL OF THE MORTGAGED PROPERTY TO ANOTHER COUNTY, WAS A VALID SUBSISTING LIEN AGAINST THE MORT- GAGED EQUIPMENT.

No claim is made by the trustee that the chattel mortgage was not executed and recorded in accordance with Section 2957 of the Civil Code of the State of California. It was recorded in the County of San Joaquin on the second day after its execution. The mortgagor resided in that county and the mortgaged equipment was located there. There is no element of lack due to execution, failure to record or delay in recording. Upon compliance with the statute, appellant acquired a property right in the mortgaged equipment good against all creditors of the mortgagor.

II.

THE REMOVAL BY THE MORTGAGOR OF THE MORTGAGED PROPERTY, AND ITS LOCATION IN THE COUNTY OF REMOVAL FOR MORE THAN THIRTY DAYS SUSPENDED THE PRE-EXISTING VALID LIEN.

The pertinent statutes relating to removal of mortgaged property are Sections 2965⁴ and 2966⁵ of the Civil Code of California. These statutes furnish the legislative solution to the problem of removal of mortgaged property in California. A majority of states require no additional action on the part of the mortgagee to preserve his lien. Other states, like California, require the mortgagee to follow the property and protect the lien by an additional filing.⁶

Under Section 2965 of the Civil Code the lien on the mortgage is not affected for thirty days after the

⁴Sec. 2965. (Mortgaged personal property, effect of removal.) When personal property mortgaged (other than animate personal property mortgaged by a resident of this state, and motor vehicles and other vehicles defined in and the mortgaging of which are regulated by the California Vehicle Act), is removed from the county in which it is situated, the lien of the mortgage shall not be affected thereby for thirty days, after such removal; but, after the expiration of such thirty days, said property mortgaged, is exempted from the operation of the mortgage, except as between the parties thereto, until either:

1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or
2. The mortgagee takes possession of the property as prescribed in the next section.

⁵Sec. 2966. (Mortgagee may take possession and sell property as pledge, when.) If the mortgagor voluntarily removes or permits the removal of the mortgaged property save in the case of animate chattels mortgaged by a resident of this state, from the county in which it was situated, at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due.

⁶For cases in other jurisdictions see: Jones—Chattel Mortgages and Conditional Sales, Par. 260, Vol. 1, page 434. See also: 103 A.L.R. 198, Annotation—Chattel Mortgage—Removed Property.

removal of the mortgaged property.⁷ After the expiration of such thirty days, the property "is exempted from the operation of the mortgage except as between the parties thereto until either (1) the mortgagee causes the mortgage to be recorded in the county to which the property has been removed or (2) the mortgagee takes possession of the property as prescribed in Section 2966."⁸

The pertinent portion of Section 2965 was incorporated into the law in 1909.⁹ Its present form was the result of amendments in 1923 and 1935 to cover matters not here material.¹⁰ Prior to the 1909 amendment, the statute provided that the property was "exempted from the operation thereof unless either" the mortgagee within thirty days after such removal recorded in the new county or within thirty days took possession of the property.¹¹ In *Hopper v. Keys*¹² the early statute was interpreted to mean that failure by the mortgagee to record in the new county or take possession of the property removed before thirty days had elapsed exempted the property for all time from the mortgage lien; that it voided the mortgage and no subsequent recordation or taking of possession could revive it. Under the present statute, the lien is not voided for all time but merely suspended until such time as the mortgagee shall take affirmative action. The statutory words "exempt from the operation of

⁷*Pacific Fruit Exchange v. Booth Co.*, 103 C. A. 54, 283 P. 944.

⁸Notes 4 and 5, *supra*.

⁹Statutes 1909, page 44.

¹⁰Statutes 1923, page 139; Statutes 1935, page 2227.

¹¹Enacted March 21, 1872.

¹²152 Cal. 488, 92 Pac. 1017.

the mortgage" express a clear legislative intent that the mortgage is not void but is voidable only until the mortgagee records or takes possession.¹³

III.

THE PRE-EXISTING VALID LIEN WAS RE-ESTABLISHED BY THE MORTGAGEE TAKING POSSESSION.

The argument here covers a pivotal point in this case. Is the lien re-established by the mortgagee's affirmative act in re-possessing the property, or is the "exemption from the operation of the mortgage" removed only by re-possession plus sale as a pledge? We find no cases construing these statutes.

The answer to this question obviously involves the construction of Sections 2965 and 2966.¹⁴

It is noted that by its terms Section 2965 requires only that the mortgagee *take possession of the property* as prescribed in the next section. It does not require that the mortgagee take possession *and sell* as prescribed in the next section. To adopt the trial Court's construction of the statute is to place into the statute words that the statute does not contain. If the trial Court's construction were adopted the statute would read:

¹³See *California Law Review*, Vol. 16, pages 135, 137:

"In other words, under the amended section, the lien is not voided for all time, but merely suspended until such time as the mortgagee shall act."

¹⁴Notes 4 and 5, *supra*, for text.

“2. The mortgagee takes possession of the property *and sells* as prescribed in the next section.”

It is submitted that this construction is strained and unwarranted in view of the fact that the mortgagee has acquired a property right by the initial recording of his chattel mortgage.

It would appear that 2965 and 2966 can be read together without conflict giving full effect to all of the words of both statutes. Section 2966 accomplishes two things:

(1) It authorizes the mortgagee to take possession and thus remove the exemption of 2965; and

(2) It implements the possession thus obtained with a power to sell as a pledge even though the debt is not due.

It thus provides the necessary relief to a mortgagee whose property has been surreptitiously removed but whose debt is not due. The statute, in effect, provides for a statutory acceleration of the maturity of the debt once possession is taken. Otherwise, the mortgagee could take possession, but the debt not being due, could not foreclose. Only this interpretation gives full effect to the use of the words “though the debt is not due” in the statute.

In the instant case, the debt was due and the mortgagee foreclosed under the power of sale contained in the mortgage. Appellant did not have to avail itself

of the statutory authorization to sell as a pledge because the debt was due.

Traditionally, taking possession of mortgaged property and the sale thereof are separate acts. The mortgagee's power of sale is determined by the statutes or by the terms of the mortgage instrument in accordance with rights given to him by the mortgagor. California permits liberal use of the power of sale contained in a mortgage.¹⁵ It is submitted that it is a strained construction of the statute to say that in all other cases a mortgagee may exercise a power of sale conferred by a mortgage, but if he repossesses property wrongly removed from the county in which it is located he must then disregard the terms of his mortgage and dispose of the property as a pledge. To so hold would enable a mortgagor to enlarge his rights by tortious and wrongful conduct.

A further logical difficulty is encountered in adopting the trial Court's construction of the statute. The Court holds that the lien is re-established only by a sale as a pledge. However, a sale does not create a lien—it extinguishes the lien. It is therefore logically inconsistent to construe a statute so that a lien is re-created only by an act of sale which extinguishes it.

The trial Court's strained construction of Section 2966, if adopted, is fraught with further difficulties. If the lien is revived only by repossession plus sale

¹⁵*Dohrman v. Durstow*, 90 C. A. (2d) 236, 202 P. (2d) 607. Agreement for informal foreclosure at private sale, with or without notice is valid.

as pledge, it would follow that after possession and prior to a sale a judgment creditor could levy on the property. This would be contrary to the provision of Section 2965, which states that the mortgaged property is exempted only until "the mortgagee takes possession."

CONCLUSION.

It is submitted that a reasonable construction of the statutes reflects the legislative intent that the exemption from the operation of the mortgage should continue only until the mortgagee takes affirmative action either by recording in the new county or by taking possession; and that Section 2966 merely implements the mortgagee's possession by giving a power to sell though the debt is not due. The equities in this situation wholly favor appellant. Appellant properly recorded its mortgage in San Joaquin County and when it ascertained that the property had been removed it repossessed it. Since the debt was then due, it sold the property to a bona fide third person under the power of sale contained in the mortgage. The Bankrupt paid nothing for the property and had the full use of it prior to repossession. The creditors were in exactly the same position after the repossession as they were before the personal property was sold to the Bankrupt. To say that a mortgagee must dispose of the property as a pledge when the debt is already due takes from such mortgagee a substantial right guaranteed to him by the contract between the parties.

Such a construction of the statute should not be made when it can be given an obvious construction consistent with the rights of the parties.

Dated, Stockton, California,

August 4, 1950.

Respectfully submitted,

DANIEL S. LANE,

Attorney for Appellant.

JONES, LANE & WEAVER,

Of Counsel.

No. 12,559

IN THE

United States Court of Appeals
For the Ninth Circuit

MOORE EQUIPMENT Co., INC. (a corporation),

Appellant,

vs.

JOHN O. ENGLAND, as Trustee of the
Estate of Ted E. Fisher and Maxeen
R. Fisher, Bankrupt,

Appellee.

Appeal from the United States District Court, Northern
District of California, Northern Division.

BRIEF FOR APPELLEE.

SHAPRO & ROTHSCHILD,

155 Montgomery Street, San Francisco 4, California,

Attorneys for Appellee.

RAYMOND T. ANIXTER,

155 Montgomery Street, San Francisco 4, California,

Of Counsel.

FILED

SEP 6 - 1950

PAUL P. O'BRIEN,

Subject Index

	Page
Statement of facts	1
Statement of the case.....	2
Argument	3

I.

“The authority for the creation of a chattel mortgage in this state derives its source from statutory enactments and all rights accruing by virtue of such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions”	3
--	---

II.

Effect should be given to every part of a code section, if possible, to the end that the different provisions are harmonized	6
--	---

III.

The mortgaged property having been exempted from the operation of the mortgage, appellant is in the same position as a mortgagee having possession under an unrecorded chattel mortgage	8
---	---

IV.

The trustee in bankruptcy is vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such creditor exists.....	9
---	---

V.

Sections 2965 and 2966 of the California Civil Code as amended in 1935 relieve mortgagee of a hardship. The failure of appellant to comply with these code sections created any purported hardship	10
Conclusion	11

Table of Authorities Cited

Cases	Pages
Chelhar v. Acme Garage, 18 Cal. App. (2d) 775.....	8
Davidson v. Burns, 38 Cal. App. (2d) 188.....	7
Edwards v. Sweigert, 15 Cal. App. 503.....	7, 10
French v. Teschemaker, 24 Cal. 518.....	6
Gates v. Salmon, 35 Cal. 576.....	7
Hopper v. Keyes, 152 Cal. 488.....	5
Langenour v. French, 34 Cal. 92.....	7
Loosemore v. Baker, 175 Cal. 420.....	8
Los Angeles Co. v. Emme, 42 Cal. App. (2d) 239.....	7
Noyes v. Bank of Italy, 206 Cal. 266.....	8
People v. Perkins, 85 Cal. 509.....	7
Rumetsch v. Oakland, 135 Cal. App. 267.....	7

Statutes

Civil Code of California:

Sections 2965, 2966	10
Section 2965	2, 3, 4, 5, 6, 7, 8, 9, 10, 11
Section 2966	2, 3, 4, 5, 6, 7, 10, 11
Section 2965, sub-paragraph 1	10
11 U.S.C., Section 96b (Bankruptcy Act, Sec. 60b).....	1, 8
11 U.S.C., Section 110e (Bankruptcy Act, Sec. 70e).....	9
28 U.S.C. 1291	2

No. 12,559

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MOORE EQUIPMENT Co., INC. (a corporation),

Appellant,

vs.

JOHN O. ENGLAND, as Trustee of the
Estate of Ted E. Fisher and Maxeen
R. Fisher, Bankrupt,

Appellee.

**Appeal from the United States District Court, Northern
District of California, Northern Division.**

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Appellee, a Trustee in Bankruptcy, commenced an action in the United States District Court to set aside a voidable preference received by Appellant, under the provisions of section 60b of the Act of Congress Relating to Bankruptcy. (11 United States Code 96b.) Appellee received judgment and Appellant moved for a new trial. This motion was denied by the District Judge and a written Opinion was filed which could well be adopted as Appellee's brief. (Transcript of

Record, pp. 23-28.) An appeal was perfected by Appellant pursuant to Title 28 United States Code 1291.

The case was tried on the basis of a Stipulation of Facts (T.R. pp. 9-13) and an Amendment thereto (T.R. p. 12). The statement of facts in Appellant's brief omits that portion of the facts which were set fourth in the Amendment to the Stipulation of Facts, to-wit, that at the time the Defendant repossessed the property from the Bankrupt, said Bankrupt was insolvent and said Defendant had reasonable cause to believe that on said date the said Bankrupt was insolvent. (T.R. p. 14.) With this exception Appellant's Statement of Facts is fair and complete.

STATEMENT OF THE CASE.

There is only one issue of law raised in the instant case. Where inanimate personal property mortgaged by a resident of this state has been moved from the county in which it is situated, and remains out of said county for more than thirty days, thus exempting said property from the operation of the mortgage, is the lien of the mortgagee irrevocably lost until the provisions of sections 2965 and 2966 of the Civil Code of California are complied with by mortgagee either recording the mortgage in the county to which the property has been removed or taking possession of the property and disposing of the same as a pledge for the payment of the debt?

ARGUMENT.**I.**

“THE AUTHORITY FOR THE CREATION OF A CHATTEL MORTGAGE IN THIS STATE DERIVES ITS SOURCE FROM STATUTORY ENACTMENTS AND ALL RIGHTS ACCRUING BY VIRTUE OF SUCH MORTGAGES CAN BE PROTECTED AND PRESERVED ONLY BY FULLY MEETING THE REQUIREMENTS OF THE STATUTE AND STRICTLY OBSERVING ITS PROVISIONS.’”¹

Appellant’s first point is merely a restatement of a portion of the Stipulation of Facts. The validity of the chattel mortgage prior to the removal of the property from San Joaquin County is not questioned.

Appellee also agrees with Appellant’s second point—that after the property was permitted to remain out of San Joaquin County for more than thirty days the property was exempted from the operation of the mortgage.

Appellant’s third point is really the only point raised on the appeal: whether Appellant complied with the provisions of sections 2965 and 2966 of the Civil Code of California? These provisions and their interpretation formed the basis of the decision in the District Court and are as follows:

“Sec. 2965. (Mortgaged personal property, effect of removal.) When personal property mortgaged (other than animate personal property mortgaged by a resident of this state, and motor vehicles and other vehicles defined in and the mortgaging of which are regulated by the California Vehicle Act), is removed from the county

¹Opinion of Trial Judge. (T.R. p. 24.)

in which it is situated, the lien of the mortgage shall not be affected thereby for thirty days, after such removal; but, after the expiration of such thirty days, said property mortgaged, is exempted from the operation of the mortgage, except as between the parties thereto, until either:

“1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

“2. The mortgagee takes possession of the property as prescribed in the next section. (Enacted 1872; Am. Stats. 1909, p. 44; Stats. 1923, p. 139; Stats. 1935, p. 2227.)”

“Sec. 2966. (Mortgagee may take possession and sell property as pledge, when.) If the mortgagor voluntarily removes or permits the removal of the mortgaged property, save in the case of animate chattels mortgaged by a resident of this state, from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due. (Enacted 1872; Am. Stats. 1923, p. 140; Stats. 1935, p. 2227.)”

What did Appellant do after the property was in Stanislaus County for more than thirty days? It merely took possession of the property and proceeded to sell the *same under the power of sale contained in the mortgage*. (Italics ours.) It did not even make an attempt to proceed pursuant to sections 2965 and 2966. (Stipulation VII, T.R. pp. 11-12.) The taking of possession was pursuant to the remedies given by the mortgage on default and was only coincidentally a

compliance with a portion of the provisions of section 2965 of the Civil Code of California.

Appellant completely disregarded the provisions of section 2966 and sold the property at private sale pursuant to the power given in the mortgage instead of disposing of it as a pledge as required when the property is out of the county for more than thirty days. This being a statutory procedure, there must be full compliance.

Hopper v. Keys, 152 Cal. 488.

If Appellant's contention that mere taking of possession complies with the code requirements is to be given consideration, then the words "as prescribed in the next section" contained in section 2965, are to be completely disregarded. Yet Appellant does not want to go quite this far, but argues that we can reconcile 2966 with its interpretation by deleting therefrom the words "and dispose of the property as a pledge for the payment of a debt, though the debt is not due." The answer to these abortive arguments is that if the legislature intended such construction it would have so provided. Section 2966 could have been omitted entirely. Appellant not only failed to comply with the requirements above set forth, but proceeded in accordance with the provisions of his mortgage, independently of the section.

II.

EFFECT SHOULD BE GIVEN TO EVERY PART OF A CODE SECTION, IF POSSIBLE, TO THE END THAT THE DIFFERENT PROVISIONS ARE HARMONIZED.

Personal property mortgages exist and have their basis under the provisions of the Civil Code. Appellant's position would render meaningless the concluding clause of section 2965 "as prescribed in the next section." This contention is not supported by any authority and disregards the accepted rules of statutory interpretation. The two Code sections above set forth are in *pari materia*. The words quoted point to the nature of the possession required in order to revive the mortgage. They are words of qualification. Mere possession does not satisfy the statute but possession as prescribed by section 2966, namely for the purpose and to the end of selling the property "as a pledge for the payment of the debt". Appellant's possession was not for that purpose, but for the purpose of sale under the terms of the mortgage.

The intent of the legislature must be considered in the interpretation of these provisions. The legislature did not intend to use meaningless or purposeless words and there can be no presumption to the contrary.

French v. Teschemaker, 24 Cal. 518, 557.

Words should never be considered unnecessary and surplusage if a reasonable construction can be adopted which will give force to and preserve all of the terms of the statute. It is a cardinal rule of construction of statutes that some effect must be given

to every word and clause, if possible. Words in a statute should never be construed as unnecessary if a reasonable construction can be adopted which will give force to and preserve all the words of the statute.

People v. Perkins, 85 Cal. 509, 511;

Gates v. Salmon, 35 Cal. 576, 587;

Langenour v. French, 34 Cal. 92, 98 and 99;

Edwards v. Sweigert, 15 Cal. App. 503, 507;

Rumetsch v. Oakland, 135 Cal. App. 267, 269;

Davidson v. Burns, 38 Cal. App. (2d) 188, 191;

Los Angeles Co. v. Emme, 42 Cal. App. (2d) 239, 242.

Appellant contends that the trial court has rewritten section 2965 to read as follows: "2. The Mortgagee takes possession of the property *and sells* as prescribed in the next section." (Italics ours.) Appellant's own contention would deprive section 2966 of all meaning and would eliminate the words "and dispose of the property as a pledge for the payment of a debt" from section 2966. Appellant by these contentions is endeavoring to play with words. The only interpretation of these sections that Appellee requests is to give the words used their literal meaning as intended by the legislature, and interpreted by the court below.

Gates v. Salmon (supra).

The section is clear as contained in the Code.

Thus Appellant's failure to heed all of the provisions of sections 2965 and 2966 was fatal to its attempt to revive the lien of the mortgage.

III.

THE MORTGAGED PROPERTY HAVING BEEN EXEMPTED FROM THE OPERATION OF THE MORTGAGE, APPELLANT IS IN THE SAME POSITION AS A MORTGAGEE HAVING POSSESSION UNDER AN UNRECORDED CHATTEL MORTGAGE.

Since Appellant failed to revive the mortgage by either of the two methods mentioned in section 2965 the property remained exempted from its operation. Appellant was in no better position at the time of the sale than a mortgagee in possession under an unrecorded chattel mortgage.

Loosemore v. Baker, 175 Cal. 420;

Chelhar v. Acme Garage, 18 Cal. App. (2d) 775, 781.

The taking of possession and selling at private sale within four months of the filing of the Petition in Bankruptcy at a time when the Bankrupt was insolvent and Appellant had reasonable cause to believe the Bankrupt to be insolvent was a preference. (Amend. to Stip. T.R. p. 14.) The preference is voidable at the instance of a Trustee in Bankruptcy.

11 U.S.C. § 96b: Bankruptcy Act § 60b;²

Noyes v. Bank of Italy, 206 Cal. 266.

²“Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value * * *”

IV.

THE TRUSTEE IN BANKRUPTCY IS VESTED AS OF THE DATE OF BANKRUPTCY WITH ALL THE RIGHTS, REMEDIES, AND POWERS OF A JUDGMENT CREDITOR THEN HOLDING AN EXECUTION DULY RETURNED UNSATISFIED, WHETHER OR NOT SUCH CREDITOR EXISTS.³

Section 2965 provides that when the property has been permitted to remain out of the county in which it was originally situated for more than thirty days, the property mortgaged is exempted from the operation of the mortgage except as between the parties. The Trustee in Bankruptcy is vested, as of the date of bankruptcy, with the same rights, remedies and powers as a judgment creditor then holding an execution lien unsatisfied, whether or not such creditor actually exists.

11 U.S.C. § 110c: Bankruptcy Act § 70c.

³11 U.S.C. § 110c: Bankruptcy Act § 70c. "The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists."

V.

**SECTIONS 2965 AND 2966 OF THE CALIFORNIA CIVIL CODE AS
AMENDED IN 1935 RELIEVE MORTGAGEE OF A HARDSHIP.
THE FAILURE OF APPELLANT TO COMPLY WITH THESE
CODE SECTIONS CREATED ANY PURPORTED HARDSHIP.**

Appellant seems appalled by the idea that under the proper construction of the statutes, after a mortgagee takes possession under 2965 and prior to the pledge sale under 2966, a judgment creditor could levy an execution on the property. Appellant could prevent this by the simple expedient of recording the mortgage in the county to which the property had been moved in accordance with the provisions of section 2965, sub-paragraph 1.

Appellant cannot claim hardship or inequity as a result of its own omissions. The rights obtained under its original mortgage were received by virtue of express statutes applicable thereto. The lien was lost, except as between the parties thereto, by failure to follow the provisions of these same statutes. An opportunity was provided by statute for the revival of the mortgage but by its failure to follow a procedure expressly set forth for its benefit, Appellant lost its opportunity.

Calif. Civil Code 2965, 2966.

Although we do not believe that Appellant could suffer any hardship from following the procedure set forth in the above sections, the fact that some hardship might arise from failure to comply with them fully would not prevent the application of the sections.

Edwards v. Sweigert, 15 Cal. App. 503.

CONCLUSION.

It is submitted that when the mortgaged property was admittedly exempted from the operation of mortgage after its removal from San Joaquin County for more than thirty days and Appellant failed to either record the mortgage in Stanislaus County or to take possession and dispose of the same as a pledge under the provisions of sections 2965 and 2966 of the Civil Code of California, the mortgage was not revived; that the sale of the mortgaged property within four months of bankruptcy by Appellant effected a preference voidable at the instance of the Trustee in Bankruptcy; and that the judgment of the District Court in favor of Appellee should be sustained.

Dated, San Francisco, California,
September 6, 1950.

Respectfully,
SHAPRO & ROTHSCHILD,
Attorneys for Appellee.

RAYMOND T. ANIXTER,
Of Counsel.



No. 12560

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

F. E. NEMEC,

Appellant,

UNITED STATES OF AMERICA,

Appellee.

No. 12560

*On Appeal from the District Court of the United
States, for the Eastern District of Washington*

BRIEF FOR THE APPELLEE

HARVEY ERICKSON

United States Attorney

FRANK R. FREEMAN

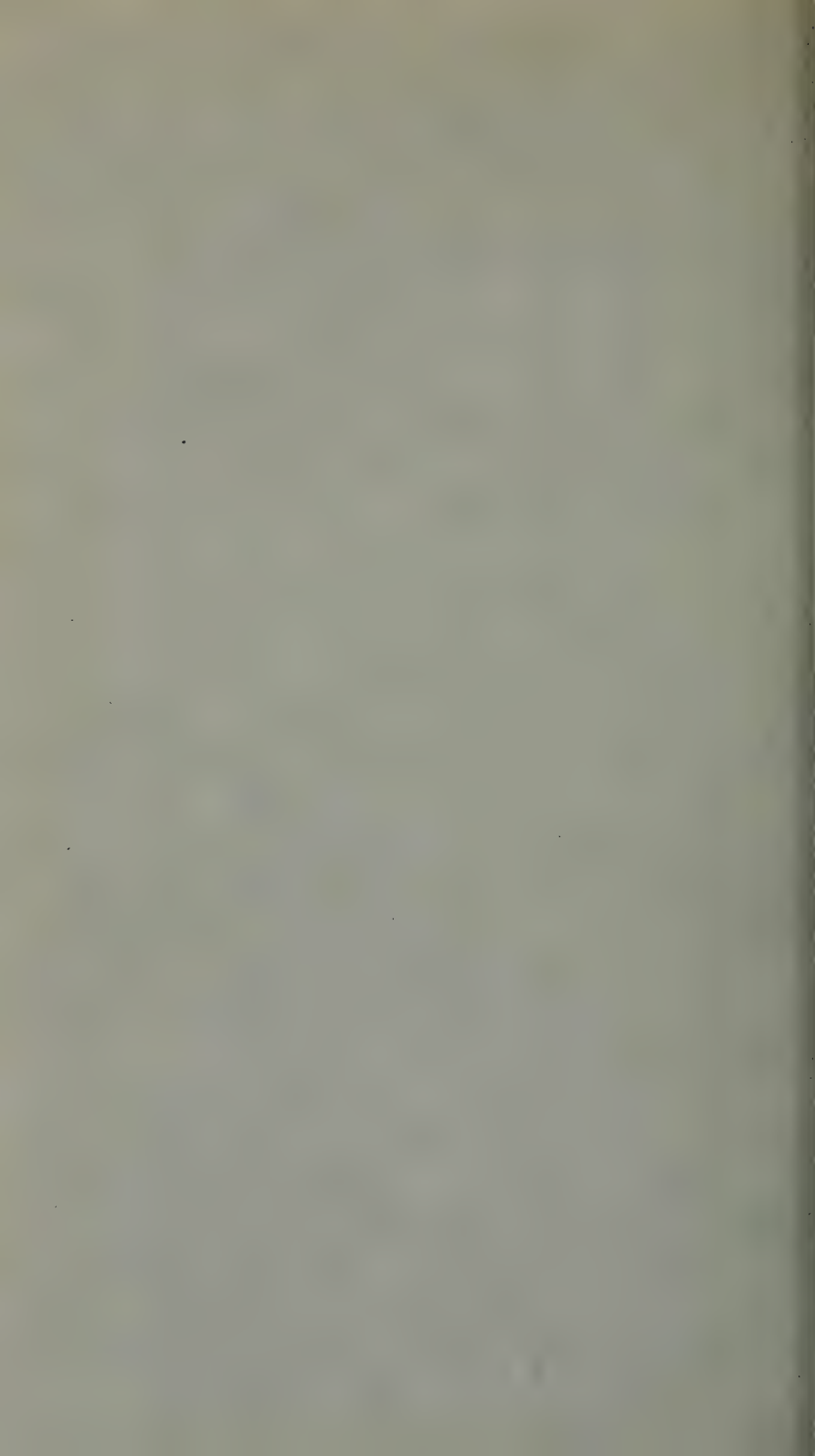
*Assistant United States Attorney
Attorneys for Appellee*

FILED

JUN 27 1950

P. O'BRIEN,

CLERK



INDEX

	<i>Page</i>
Statement of Jurisdiction	1
Statement of the Case.....	1
Appellant Nemec's Assignments of Error.....	2
Argument	2
Conclusion	7
Appendix	8

TABLE OF CASES

<i>Berman v. United States</i> , 302 U. S. 211, 214.....	4
<i>Carter v. McClaughry</i> , 183 U. S. 365, 395.....	6
<i>Heike v. United States</i> , 227 U. S. 131, 144.....	6
<i>Holmes v. United States</i> , 134 F. (2d) 125.....	6
<i>Pinkerton v. United States</i> , 328 U. S. 640.....	6
<i>Sneed v. United States</i> , 298 Fed. 911 at 913.....	6
<i>Spirou v. United States</i> , 24 F. (2d) 796, 797.....	4
<i>United States v. Freeman</i> , 167 F. (2d) 786.....	6
<i>United States v. Nemec</i> , 178 F. (2d) No. 4, 656.....	2
<i>Corpus Juris Secundum</i> , Vol. 4, Appeal and Error Par. 607, Page 1091.....	4

No. 12560

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

F. E. NEMEC,

Appellant,

UNITED STATES OF AMERICA,

Appellee.

} No. 12560

*On Appeal from the District Court of the United
States, for the Eastern District of Washington*

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The Circuit Court of Appeals has jurisdiction of the instant case under the provisions of Title 28, Sections 1291 and 2255, United States Code.

STATEMENT OF THE CASE

On or about July 2, 1948, the appellant F. E. Nemec was convicted by jury in the District Court of the United States for the Eastern District of Washington, Northern Division, on four counts of criminal violations against the United States. The gist of the four

counts was that the appellant Nemec, and others, had defrauded numerous Washington investors by the sale of mining claims in California through false and fraudulent representations and promises.

Appellant Nemec was sentenced on July 2, 1948, to a term of two years on Count I, the conspiracy count; a term of one year on Count II, the mail fraud count; a term of one year on Count IV, a Securities and Exchange Act count; and a term of one year on Count V, a Securities and Exchange Act count. Imprisonment on Counts I, II, and IV to run consecutively—a total of four years; imprisonment on Count V to run concurrently with the sentences on the other counts.

Appellant Nemec appealed his conviction to the United States Circuit Court of Appeals for the Ninth Circuit. By opinion dated December 14, 1949, in case No. 11975, the Circuit Court affirmed his conviction. The opinion of the Court is reported in 178 F. (2d), No. 4, Page 656.

On or about February 13, 1950, the appellant filed a Petition for Writ of Certiorari to the United States Supreme Court to review the judgment of conviction after his petition for rehearing to the Circuit Court of Appeals was denied. Appellee has now been informed that appellant's Petition for Writ of Certiorari was denied on June 5, 1950. The mandate has not yet been returned to the District Court for the Eastern District of Washington.

On or about February 27, 1950, the appellant filed with the Clerk of the District Court for the Eastern District of Washington at Spokane a Motion to Vacate

Judgment and Sentence. On March 9, 1950 (Tr. 12) the Honorable Sam M. Driver, Judge of the above District Court, denied said motion on the ground that, since the mandate in the earlier appeal had not yet been received from the Circuit Court of Appeals, the Court had no jurisdiction to entertain said motion (Tr. 19). It is from this order that the appellant is taking his present appeal.

APPELLANT NEMEC'S ASSIGNMENT OF ERROR

Appellant sets forth a number of points of alleged error, most of which were already once disposed of in his previous appeal wherein his conviction was affirmed. From a reading of his brief, it would appear that he now urges two assignments of error. These two assignments of error, together with the argument of appellee, are:

ARGUMENT

1. Answer to appellant Nemec's assignment of error that the District Court was in error in denying appellant's Motion to Vacate Judgment and Sentence on the ground that while the case was still pending on appeal the Court was without jurisdiction.

As hereinbefore stated, the appellant Nemec filed his Motion to Vacate Judgment and Sentence in the District Court on or about February 27, 1950. At the time of the filing of that motion his earlier appeal from his conviction was still pending before the United States Supreme Court on his petition for Writ of Certiorari.

As hereinbefore stated, the United States Supreme Court did not deny the writ until June 5, 1950. The Clerk of the District Court still has not received the mandate in this cause from the Circuit Court of Appeals. Such being the case, it is the position of the appellee that the Court was entirely correct in determining that he had no jurisdiction until the appeal had been finally consummated and the mandate returned to the District Court.

The rule is well set forth in *Corpus Juris Secundum*, Vol. 4, Appeal and Error, Par. 607, Page 1091:

“The perfection of the appellate proceedings, and consequent transfer of jurisdiction vests the appellate court, with exclusive power over the subject matter of the proceedings, and suspends the power of the lower court with reference thereto, although it retains power to do anything necessary to the presentation of the case in the appellate court.”

The rule is also well stated in *Berman v. United States*, 302 U. S. 211, 214:

“As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner.”

The filing of a Writ of Error with the Circuit Court removing the cause was held to deprive the District Court of any further jurisdiction in *Spirou v. United States*, 24 F. (2d) 796, 797.

The position of appellee is supported by the Federal Rules of Criminal Procedure. Rule 39 (a) of the Rules provides:

“The supervision and control of the proceedings on appeal shall be in the appellate court from the time the motion of appeal is filed with its clerk, except as otherwise provided in these rules.”

Rules 39(c) and 46(a)(2) indicate that after a motion of appeal is filed the trial court loses jurisdiction with but two exceptions: (1) for the extension of time for filing and docketing the appeal (Appendix), and, (2) for the allowance of bail bond pending appeal (Appendix). Obviously the motion herein directed to the trial court does not come within either exception.

Rule 33 of the Federal Rules of Criminal Procedure, providing for new trials, significantly states that “if an appeal is pending the court may grant the motion only on remand of the case.”

It is appellee’s position that the motion of the appellant to vacate judgment and sentence was premature.

2. Answer to appellant Nemec’s assignment of error—that he was twice convicted and sentenced on the same offense, inasmuch as the conspiracy count and the substantive counts of the indictment allege substantially the same offense and intent and were supported by the same evidence.

It is urged by the appellee that this appeal should be restricted to the one question involved: whether or not the trial court had jurisdiction to hear appellant’s Motion to Vacate Judgment and Sentence. Appellant’s above assignment of error was listed by him as a ground of appeal in his notice of appeal filed upon his criminal conviction. The question of double jeopardy was rightfully a matter for argument on the appeal of his conviction, not here.

In any case, however, the aforesaid assignment of error has no merit. It is well established that conspiracy is a crime separate from substantive crimes and may be prosecuted with the latter. *United States v. Freeman*, 167 F. (2d) 786.

The position of the appellant is well answered in *Pinkerton v. United States*, 328 U. S. 640, at 643, wherein it was stated:

“It has been long and consistently recognized by the court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established.”

A conviction for the conspiracy may be had, though the substantive offense was completed. *Heike v. United States*, 227 U. S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter v. McClaughry*, 183 U. S. 365, 395. Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive counts. As stated in *Sneed v. United States*, 298 Fed., 911, at 913:

“If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.”

In *Holmes v. United States*, 134 F. (2d) 125, cert. denied, 319 U. S. 776, the court pointed out that a defendant could not complain of a conviction of violating a Securities Exchange Act and of using the mails to defraud, embraced in several counts, and of conspiracy to effect the scheme to defraud embodied in such counts,

on grounds that through the conspiracy count he was twice convicted of the same offense, since conspiracy was a different offense from that charged in the other counts.

CONCLUSION

Appellee respectfully urges that the trial court committed no error in denying appellant's Motion to Vacate Judgment and Sentence on the basis that the court had no jurisdiction while his earlier conviction was on appeal and the mandate unreturned.

Appellee further respectfully urges that in any case appellant has not been subjected in his conviction and sentencing on a conspiracy count and several substantive counts to double jeopardy.

The appellee respectfully prays that the petition of appellant Nemec be denied.

Respectfully submitted,

HARVEY ERICKSON

United States Attorney

FRANK R. FREEMAN

*Assistant United States Attorney
Attorneys for Appellee*

APPENDIX

Federal Rules of Criminal Procedure

Rule 39. Supervision of Appeal

(c) Docketing of Appeal and Record on Appeal. The record on appeal shall be filed with the appellate court and the proceeding there docketed within 40 days from the date the notice of appeal is filed in the district court, but if more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date the first notice of appeal is filed. In all cases the district court or the appellate court or, if the appellate court is not in session, any judge thereof may for cause shown extend the time for filing and docketing.

Rule 46. Bail

(a) (2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail.

No. 12561

United States
Court of Appeals
For the Ninth Circuit.

LIBBY, McNEILL & LIBBY, a Corporation,
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Insurance Commissioner, At-
torney General for Alaska and the Territorial
Commissioner of Labor and John Landro,
Appellees.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska
First Division

No. 12561

United States
Court of Appeals
For the Ninth Circuit.

LIBBY, McNEILL & LIBBY, a Corporation,
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Insurance Commissioner, At-
torney General for Alaska and the Territorial
Commissioner of Labor and John Landro,
Appellees.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska
First Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Admission of Service and Answer to Application	40
All Docket Entries in No. 6139-A.....	83
Appellant's Objections 4, 5, 6 and 7 of January 27, 1949	43
Application for Adjustment of Claim.....	38
Attorneys of Record.....	1
Certificate of Clerk.....	90
Complaint and Appeal From Decision and Award of Alaska Industries Board Under "The Workmen's Compensation Act of Alaska"	2
Deposition of O. J. Fortun	57
Deposition of Defendant Landro	44
Designation of Contents of Record on Appeal.	88
District Court's Opinion.....	72

INDEX

PAGE

Exhibits:

No. 1—Deposition of Dr. A. Bernard Gray	9
—direct	11
—cross	19
—redirect	27
—recross	29
2—Board Decision and Award.....	32
3—Letter Dated May 20, 1949.....	36
Judgment	74
Letter of Dr. E. A. LeCocq.....	85
Minute Order of January 18, 1950, Journal No. 19, Page 360.....	71
Notice of Appeal.....	76
Second Designation of Contents of Record on Appeal	84
Statement of Points.....	79
Stipulation to Make John Landro Party De- fendant	37
Supersedeas on Appeal.....	79

ATTORNEYS OF RECORD

R. E. ROBERTSON,

Seward Building,
Juneau, Alaska,

For Appellants.

HENRY RODEN,

Juneau, Alaska,

For Appellee John Landro.

J. GERALD WILLIAMS,

Territorial Attorney General,

Juneau, Alaska,

For Appellees Alaska Industrial
Board et al.

COMPLAINT AND APPEAL FROM DECISION
AND AWARD OF ALASKA INDUSTRIAL
BOARD UNDER "THE WORKMEN'S
COMPENSATION ACT OF ALASKA."

Comes now the plaintiff and respectfully appeals to the District Court for the Territory of Alaska, Third Judicial Division, from that certain decision and award, hereinafter mentioned, of the defendant Alaska Industrial Board and complains and alleges:

I.

That the plaintiff, Libby, McNeill & Libby, is now and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Maine and engaged and authorized to engage in business in the Territory of Alaska; that it has paid its annual corporate license tax last due to the Territory of Alaska; that it has filed with the Auditor of the Territory of Alaska and with the Clerk of the District Court for the Third Judicial Division of Alaska its last annual report required to be filed by it by the Laws of Alaska; that it has complied and at all times hereinafter mentioned had complied with the provisions of Section 18, Chapter 9, Extraordinary Session Laws, 1946, Sec. 43-3-18, ACLA 1949, as a self-insurer under said Chapter 9 and does now and at all of said time did hold a certificate as a self-insurer under said law from the defendant, Alaska Industrial Board.

II.

That the plaintiff was at all the times hereinafter mentioned engaged in the operation of a salmon

cannery at Ekuk, Alaska, and had in its employ three or more employees.

III.

That the Alaska Industrial Board, hereinafter designated as Board, was created and now exists by virtue of the provisions of Chapter 9, Extraordinary Session Laws 1946, Sections 43-3-1 to 43-3-39, both inclusive, ACLA 1949, known as the Workmen's Compensation Act of [3*] Alaska, hereinafter designated as "Compensation Act" and under said Compensation Act its membership is composed of the following three persons, namely: The Territorial Insurance Commissioner, Attorney General of Alaska, and the Territorial Commissioner of Labor; that Frank A. Boyle is now and at all the time hereinafter mentioned was the Territorial Insurance Commissioner; that J. Gerald Williams is now and at all the times hereinafter mentioned was Attorney General of Alaska; that Henry A. Benson is now and at all the times hereinafter mentioned was Territorial Commissioner of Labor and the Chairman and executive officer of the defendant Alaska Industrial Board.

IV.

That the relationship of employer and employee existed between the plaintiff and one John Landro on July 5 and 6, 1948, he then having been employed by it as a fisherman in the operation of said salmon cannery by a term of employment beginning on or about June 25, 1948, to July 6, 1948.

* Page numbering appearing at foot of page of Certified Transcript of Record.

V.

That on March 24, 1949, John Landro, hereinafter designated as Claimant, made his written application for adjustment of Claim to the Alaska Industrial Board to obtain medical treatment and compensation for disability to back resulting from injury and when condition becomes fixed to rate the partial permanent disability, under the provisions of said Compensation Act, said injury claimed to have been incurred on the 5th day of July, 1948.

VI.

That plaintiff herein on or about May 26, 1949, filed with said Board its admission of service of and answer to said claim.

VII.

That on the 27th day of June, 1949, a hearing was held before said Board upon said claim, and all the evidence adduced at said hearing, together with the complete file of the Board upon said claim, subject to the objections of the plaintiff herein made at and prior to said [4] hearing, is hereby made a part of this complaint, and the plaintiff herein hereby requests said Board to submit said file to the Court.

VIII.

That thereafter and on June 28, 1949, the defendant Board by all of its said members made and entered its certain decision and award, a true and correct copy whereof, marked Exhibit II is hereunto attached and specifically made a part hereof,

but notice and copy whereof was not given to plaintiff herein until July 8, 1949.

IX.

That said decision and award is erroneous in that:

(1) The Board has no power or authority to hold that plaintiff herein must pay for the cost of a physical examination of the claimant as directed in the last paragraph of said decision and award, after one year from the date of the injury.

(2) The Board has no power and authority to award temporary disability, and to withhold decision as to partial total disability.

(3) The Board has no power or authority to award both temporary disability and partial total disability; and, if any, partial total disability is awarded then no temporary disability can be awarded.

(4) The Board has no power or authority to admit in evidence or to give any credence or weight to ex parte documents as evidence, and in doing so deprives the employer of its right of cross-examination.

(5) The Board erred in admitting in evidence the letter of Dr. Lowell E. Williams, dated May 20, 1949, a true copy whereof, marked Exhibit III, is hereunto attached and specifically made a part hereof, which letter was not only unverified but should not have been received in evidence because

said letter does not comply with the requirements of the Board's Rule of Practice, Article 9(c), but which was received in evidence and upon which letter the Board based its award.

(6) The Board erred in not basing its award upon, and in entirely ignoring, the deposition of Doctor A. Bernard Gray, wherein [5] he testified that claimant's physical condition became fixed on October 1, 1948, a true and correct copy of which deposition is hereunto attached, marked Exhibit I, and specifically made a part hereof.

X.

That the claimant John Landro is without financial means and owns no property in Alaska and should plaintiff pay or be required to pay the award of \$2577.96 for temporary total disability from October 1, 1948, to May 20, 1949, he would be unable to make repayment thereof should said decision and award thereafter be reversed or modified as to the sum to be paid him.

XI.

That the place where plaintiff's said fishing operations were conducted is now and then was in the Third Judicial Division of Alaska and within the jurisdiction of the District Court for the Territory of Alaska, Division Number Three, at Anchorage, Alaska.

XII.

That plaintiff will be substantially damaged unless, pending final decision by this court, stay be

granted of the payment by plaintiff to claimant of the sum so awarded by said decision and award to claimant because claimant is and would be unable to make refund thereof nor could plaintiff by execution or otherwise secure or enforce repayment to it thereof should said decision and award be either suspended, set aside or modified as to the sum, if any, to be paid by it to claimant; that plaintiff's failure or refusal to pay to claimant within 20 days from July 28, 1949, said sum so awarded to claimant by said decision and award subjects and will subject it, unless said decision and award be so stayed pending final decision by this court, not only to being charged with having committed a misdemeanor although having no defense thereto and, upon conviction thereof, to pay a fine of not less than \$50.00 or more than \$500.00, no part of which fine could it recover and which misdemeanor conviction would not be reversible notwithstanding that this court should later either suspend, set aside [6] or modify said decision and award, but also possibly to payment of a penalty of either 10% or 20% upon the principal of the sum so awarded to claimant.

XIII.

That plaintiff prosecutes this its appeal in good faith and not with the intent to fail or refuse to pay to the claimant such, if any, sums as may be finally awarded to him; but, it alleges that, so far as it is informed, the questions raised by its appeal have never been judicially determined by any Alaskan court.

Wherefore, the plaintiff respectfully appeals to the District Court for the Territory of Alaska for the Third Judicial Division from said Decision and Award so made by the defendant Alaska Industrial Board on June 28, 1949, and prays that an order may be entered herein staying, pending final decision in this proceeding, the payment of the amount required by said Decision and Award to be paid by it to said John Landro, and that an interlocutory injunction may be granted herein enjoining the defendant the Alaska Industrial Board and its members, namely: Frank A. Boyle, Territorial Insurance Commissioner; J. Gerald Williams, Attorney General for Alaska, and Henry A. Benson, Territorial Commissioner of Labor, as well as said John Landro from in any wise attempting to enforce, pending final decision in this proceeding, the payment of said amount by plaintiff, and that upon the final hearing herein said Decision and Award of the defendant Alaska Industrial Board may be entirely suspended and set aside, and for such other and further relief as may be meet and equitable in the premises.

Respectfully submitted,

R. E. ROBERTSON,

By /s/ F. O. EASTAUGH,

Of Attorneys for Plaintiff.

PLUMMER & ARNELL,

/s/ E. L. ARNELL,

Of Attorneys for Plaintiff.

United States of America,
Territory of Alaska—ss.

I, F. O. Eastaugh, being first duly sworn upon oath, depose and say: I am agent of the plaintiff corporation; that I have read the foregoing complaint, know its contents and they are true as I verily believe; that I make this verification on behalf of the plaintiff because no President, Treasurer, Secretary or other officer of the plaintiff is now in or a resident of Juneau, Alaska, the place where this verification is made.

F. O. EASTAUGH.

Subscribed and sworn to before me this 27th day of July, 1949, in Juneau, Alaska.

[Seal] M. E. MONAGLE,
Notary Public for Alaska.

My Commission expires March 1, 1950. [8]

EXHIBIT NO. I

DEPOSITION OF DR. A. BERNARD GRAY

called as a witness on behalf of the defendant.

Pursuant to stipulation by and between the Applicant, by his attorney, Henry Roden, Esq., and the Defendant, by its attorney R. E. Robertson, Esq., the deposition of Dr. A. Bernard Gray, called as a witness on behalf of the Defendant in the above-entitled matter, was taken on this 22nd day of June, 1949, at the hour of 12:00 o'clock M., at

602 Central Building, Seattle, King County, Washington, before E. E. Lescher, Notary Public in and for the State of Washington, residing at Seattle;

The Plaintiff appearing by Roe E. Jackson, Esq., representing Henry Roden, Esq., attorney for the Applicant;

The Defendant appearing by Robert V. Holland, Esq., (of Messrs. Bogle, Bogle & Gates), appearing on behalf of R. E. Robertson, Esq., attorney for the Defendant.

Thereupon, the following proceedings were had, and testimony given, to wit:

* * *

Mr. Holland: Let the record show that this deposition is being taken pursuant to written stipulation dated May 27, 1949, at Juneau, Alaska, signed by Mr. Henry Roden, Esq., Attorney for Applicant, represented here by Roy E. Jackson, and signed by R. E. Robertson, Esq., attorney for the Defendant, represented here by R. V. Holland, of the firm of Messrs. Bogle, Bogle & Gates.

(It was stipulated by and between the parties through their respective representatives that all objections, except as to the form of the question, or the responsiveness of the answer be reserved until the time of the hearing, and that the signature of the witness to his said deposition is waived, to which the witness himself assented.)

DR. A. BERNARD GRAY

being first duly sworn as a witness on behalf of the Defendant, was examined, and testified as follows:

Direct Examination

By Mr. Holland:

Q. Will you please state your name?

A. A. Bernard Gray.

Q. Where do you practice, Doctor?

A. In the Stimson Building, Seattle.

Q. What type of practice do you follow, if any?

A. Orthopedic and Traumatic Surgery.

Q. When did you graduate from Medical School,
Doctor? A. In 1935.

Q. What school?

A. The University of Manitoba.

Q. What degree did you obtain at that time?

A. M.D.

Q. Have you had any medical training since that time at any institutions?

A. Yes, I was intern at the Winnipeg General Hospital. I was a resident at Deer Lodge, at Winnipeg, and at the Sea View Hospital in New York. I was Attending Orthopedic Surgeon for three years at the Permanente Foundation Hospital at Oakland, California. I have been practicing my specialty in Seattle since 1945.

Q. Just briefly what were your duties at the Permanente Hospital in California, Doctor?

A. I was in charge of the section handling fractures and injuries.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Q. Did you have a staff under you at that hospital? A. Yes.

Q. Of what did your staff consist?

A. Assistants in the clinic, and in the wards, and in the emergency room, and also in the first aid stations in the shipyards. This hospital was established to look after 100,000 workers that [10] worked at the Kaiser Shipyards in Northern California.

Q. How many beds in the hospital?

A. We had two hospitals, totaling approximately 400 beds.

Q. Did you have occasion in your practice in Seattle to examine or treat John Landro?

A. Yes.

Q. In what way did this man come to you?

A. He was sent to me following an injury which he sustained in Alaska on July 6, 1948. I first saw him on July 23, 1948. He stated that he was injured on July 6th, while aboard his fishing boat, when he fell off the top of the centerboard box and struck his lower back against some planks. He said that he had considerable pain and returned to the power scow and did not resume fishing.

He further said that the next day he was taken to the cannery. He said that he had considerable pain and could not straighten up. He was given hot treatments which eased his pain somewhat, and then he was sent from that cannery, the Ekuk Cannery,

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

to Koggiung Cannery, where he was seen by the doctor, and where he was treated by injections.

Q. Is this foregoing part of the history which you received from him?

A. This is what he told me on July 23rd.

Q. Did you receive any additional history from him, Doctor?

A. I may have seen the accident report, but I do not have any record of it right now. He said that his back pain became progressively worse, and he returned to Seattle, arriving here on July 20, 1948.

We checked his past history. He said that he was a fisherman and had been for 15 years, and that between seasons he had been employed as a Mate in the Merchant Marine.

He said that he had had no previous back trouble; that [11] in 1926 he had a stomach ulcer operation, and in 1928 a compound fracture of the right arm. He said that he was single.

Q. Doctor, what was his condition at the time that you examined him, and what, if any, complaints did he make at that time?

A. He was up and around, and he was living at a hotel in Seattle. He complained of a constant severe pain across his lower back, and he said that he had difficulty in walking because of this pain. Any motion caused a stabbing pain in the right side of the lower back, and he said that he could not bend or stoop because of this pain. He felt that

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

he was not getting any better. He said that the pain radiated up in both hips and the upper thighs, but there was no numbness in his legs. He further said that coughing or sneezing aggravated the back pain—the lower back pain, but there was no radiation of the pain.

Q. Did you make an examination of him at that time, Doctor? A. Yes, sir.

Q. What were the findings of your examination?

A. I noticed that he was a somewhat thin man of 46, who appeared to be in apparent distress, and who appeared to be somewhat older than his stated age. His height was 5 feet 10 inches, and his weight was 134 pounds.

The examination of the head and neck were essentially negative. The cranial nerves were normal. His teeth were in fair condition, and his tonsils had been removed. There was a good range of painless motion of the cervical spine. Both upper limbs were normal, except for the right forearm where there was considerable atrophy of the dorsal muscles and several scars due to an old compound fracture. Heart and lungs were negative. His blood pressure was 140/84, which is normal. His abdomen was negative except for the scar from his operation. There was no hernia.

An examination of the back revealed that he stood erect, [12] with considerable spasm of the muscles of the lumbar spine and flattening of the lumbar curve.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Tenderness was mainly localized to the right ilio-lumbar region.

On forward flexion with the knees straight, the fingertips failed the floor by four inches, which indicated a good range of motion, but this aggravated the back pain, and it was noted that the lumbar spine remained fairly rigid throughout this motion.

Hyperextension was not particularly painful, but was limited to about 50 per cent. Right and left lateral flexion and rotation of the spine were somewhat limited and painful.

Straight leg raising was to 70° on each side, without pain, and pelvic rotation did not reproduce the pain.

There was a full range of motion of all the joints of the lower limbs. Both lower limbs were essentially normal. Reflexes, sensation and circulation of each lower limb was normal.

Q. Were any X-rays taken?

A. Yes. I made some radiographs. These revealed no evidence of injury except for some narrowing of the right side of the body of the fourth lumbar vertebra as compared to the left side. However, no fracture lines were visible, and the remaining vertebrae were normal.

Q. Doctor, what type of X-rays were those that you just referred to?

A. They were X-rays taken of both views of the lower spine.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Q. Were any stereoscopic X-rays taken at any time?

A. Yes. I had stereoscopic X-rays taken in the Department of Radiology at the Providence Hospital of Seattle.

Q. Did you see those X-rays, Doctor?

A. Yes.

Q. What did they reveal? [13]

A. These revealed that there was no evidence of any injury of the fourth lumbar vertebra.

Q. What, Doctor, did they reveal regarding the comment that you made just before this, that the X-rays in the office showed a slight, or were showing a narrowing of the right side of the body of the fourth lumbar vertebra?

A. These X-rays were seen by me, and were seen by the Radiologist.

Q. Speaking now of the stereoscopic X-rays, what did they reveal?

A. They revealed no evidence of fracture or bone injury about the body of the fourth lumbar vertebra.

Q. After your examination of them, Doctor, from which you made the findings, about which you have just testified, that being on the date of July 23, 1948, what was the course of treatment, if any, that you gave to this man?

A. I advised hospitalization. I admitted him to the Providence Hospital at Seattle on July 24, 1948

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

—no, July 23rd. As a matter of fact, he was admitted on the same afternoon.

Q. And will you just outline the course of treatment during the period of time that he was in the hospital?

A. He was in the hospital between July 23 and July 31. He was treated by bed rest, by physiotherapy, and by application of a lumbar sacral brace. He improved considerably, and he was allowed to leave the hospital after eight days, with essentially no discomfort. However, after he was up and around, he complained of some recurrence of the low back pain, and he was treated by me in the office by injections, and physiotherapy treatments were continued, as an out patient in the physiotherapy department of the Providence Hospital.

Q. During what course of time did these injections and physiotherapy treatments continue?

A. He was treated until October 15, 1948, at which time there had been considerable relief of his low back discomfort. [14] His main complaint was that the back tired easily, and he also developed some complaints of pain throughout the upper spine, varying in degree from time to time.

My examination on October 29, 1948, indicated that his condition had been stationary for at least four weeks. It was my opinion on that date that he was fit to go to work; that there were no special findings on objective or subjective examination or symptoms.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Q. Doctor, at that time did you form any conclusion as to the existence of any permanent partial disability by reason of his then condition?

A. Yes. I felt that the subjective symptoms represented a disability of about 10 per cent, and I recommended that if his claim was in order, it could be closed on such an award.

Q. Doctor, during your initial examination, and following treatment of this man, did you form any conclusions, or did you make any diagnosis as to the cause of his complaints in his low back area?

A. Well, there was progress there between the time he left the hospital and October 29th.

I noted that he developed a mild setback the first week in September, when he developed an upper respiratory infection associated with inflammation of the muscles of the upper dorsal spine—a myositis.

Examination on September 30, 1948, revealed that he no longer was wearing his brace, and that there was a good range of motion, and that there were no areas of tenderness over his lower spine. However, he had areas of tenderness in his dorsal spine.

Previously I had noted, on August 31, 1948, that improvement had been rapid, with almost complete relief of pain. The patient was up all day; was starting to abandon the use of his brace, and was put on exercises to increase his muscles to tone [15] so that he could be returned to work.

My diagnosis in this case was an acute contusion

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

and strain of the lower lumbar spine, which occurred July 6, 1948, and which resulted in symptoms which gradually subsided, and my diagnosis of his upper spine was that it was due to an infectious myositis or rheumatism of the muscles of the dorsal spine.

Q. This matter of the infectious myositis would have no relation to the history of his accident which occurred on July 6, 1949?

A. I am inclined to think not.

Q. And what were the findings and the conditions which you noted, or led you to your conclusion of the 10 per cent partial disability?

A. No evidence of any disability in the lower spine on clinical examination, and complaints of the lower spine tiring more easily. In other words, there was no objective evidence of disability, and I gave him his award on the basis of his subjective symptoms.

Mr. Holland: No further questions.

Cross-Examination

By Mr. Jackson:

Q. Doctor, when Mr. Landro came to you on July 23, 1948, you said that he was in pain at that time. Is that correct? A. Yes.

Q. And I think you spoke or used the term that you found muscle spasm in the spine, would you just describe for the record what muscle spasm is?

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

A. A condition of excessive tone of the lumbar muscles. A condition where the muscles won't relax, which signifies an attempt of the muscles to split the lower spine to relieve pain, due to motion of the lower spine.

Q. When you observe, however, muscle spasm in the spine, you have pain with it, is that correct? [16]

A. In this particular case it seems so.

Q. Now, Doctor, I want to ask you if on an examination of the X-rays that were taken you found evidence of Mr. Landro having arthritis of the spine?

A. I noted that there was a very slight lipping of the vertebrae. There was a small spur at the margins of the vertebrae. These indicated a response to wear and tear, a so-called degenerative arthritis of the spine, which is in a working man a fairly normal recurrence. The extent varies a lot. It is not a true arthritis. It is what is more accurately known as an asteo-arthritis, but more commonly known as hypertrophic arthritis.

Q. And will you tell us where you observed that in the spine, Doctor—this arthritis?

A. Well, what I observed was this lipping or slight spur formation, and I observed it at the lower lumbar vertebrae.

Q. Would that be in the region of the fourth and fifth lumbar?

A. Yes, sir.

Q. Did you find any evidence, Doctor, of a narrowing of the fifth intervertebral disc space

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

posteriorily? A. No.

Q. Did you make any determination, Doctor, from a study of the X-rays that there had been, or was, a definite accentuation of the normal lumbar lordosis with the sacrum approaching the horizontal position? A. No.

Q. You say that you did not?

A. No. I did not.

Q. What was your answer? A. No.

Q. Well, Doctor, did you make any determination as to the postural condition of his spine at the time of your examination, or treatment, as to whether or not this spine at the time you saw him, or during the course, or after this injury, was normal or abnormal?

A. There were no abnormal lateral curves at the time that I first saw him. His lumbar curve was somewhat flattened, rather than accentuated. As his condition improved, he had some increase of the normal dorsal outward bowing such as are seen on round-shouldered people. There was no evidence that his lumbar curve was particularly abnormal.

Q. Now, Doctor, isn't it a fact that following October 1st,—or do you remember when you stated that you thought that he was able to go to work?

A. October 29, 1948, I noted that I thought he was fit to go to work. I also noted when I examined him on September 30, 1948, that I felt that he had made satisfactory progress, that he was fit

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

to work, and that his temporary disability could be terminated on October 1, 1948.

I also noted that I doubted very much that he would return to work, as his usual occupation was on board a vessel, and it was my understanding from him that there were no jobs available at that time. However, there were essentially no findings from objective symptoms of further disability.

Q. Now, I would like to ask you, when it was that he was having this trouble that you spoke of in the upper back?

A. He developed that during the first week in September, following his cold—he had these complaints, and when he was examined on October 29, 1948, he had complaints of pain throughout the upper back.

Q. And this pain did he tell you had persisted—had been persisting all the time?

A. Yes. It was never in particularly the same position. It varied in his back.

Q. But he had pain during all the time since this accident? [18]

A. No. He had no pain in his upper back until the first week in September, which was his first complaint of pain in the upper back.

Q. Now, didn't he also tell you that he had pain in the lower back all the time that you were treating him?

Mr. Holland: This is in the lower back, you have stated?

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Mr. Jackson: Yes, in the lower back.

A. No. When I examined him he said that his lower back was tired, and there was some pain at irregular intervals. At that time, there were no areas of tenderness.

Q. He said that his back was tired, but he told you that he also was having pain, didn't he?

A. I note that he complained of some pain at irregular intervals.

Q. And he told you all this time that he had not been able to go back to work, isn't that correct?

A. Well, I know that during all this time he didn't go back to work.

Q. Now, Doctor, I would like to ask you this, in March of 1948. What was the condition of his back then when you saw him last?

A. In March of 1949, you mean?

Q. In March of 1949, I mean.

A. Well, I do not have my daily record with me, but as I recall, he came in some time last spring and said that he had seen another doctor, and he had complaints of pain. In fact, as I recall, most of his pain was in his upper back. I advised him at that time that once his case was closed, it might be advisable for him to report to the Marine Hospital, as he was eligible for treatment for this condition.

I also advised him that if he wished he could report to me at my clinic at the County Hospital, and I would see that he would get some care if

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

he was not in a position to undertake [19] private care; that I felt that his condition was not related to the injury.

Q. Now, Doctor, can you tell us what his trouble was in March of 1949, when you told him to go to the Marine Hospital or Harborview?

A. He said that he felt sick. He said that he felt weak and had rheumatic pains that apparently were generalized.

Q. And you felt that he was in need of treatment at that time? A. Yes, sir.

Q. And, Doctor, did you make any determination when you examined him, or treated him at any time, whether the injury had aggravated the arthritis of the spine?

A. There is no way that I know of whereby I can make an exact determination as to whether an injury aggravated an arthritis of the spine, except by subjective complaints, or except where there is definite bone change, resulting from the injury.

Q. Does medical science recognize that an injury such as Mr. Landro had can aggravate an arthritis of the spine? A. Yes.

Q. And, Doctor, can an injury such as Mr. Landro had, and suffering from the pain that he did in this case when he came to you, and the treatment that he was receiving, can that condition lower his resistance and make him more subject to develop an infection than an ordinarily normal, healthy person? A. I do not think so.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Q. You do not think so? A. No, sir.

Q. Well, can lowered resistance of an individual make him more susceptible to catch cold than if he is normal and healthy?

A. Yes. That is, roughly speaking in regard to what you and I understand commonly by lowered resistance. [20]

Q. Now, I would just like to ask you if this is not a fair question, that ever since this accident, or ever since he came down, and on July 23, 1948, down to when you saw him in March, he was complaining of trouble in his back?

Mr. Holland: I think you should relate that to what part of the back, since you have had testimony with reference to two separate parts.

Q. (By Mr. Jackson): If he was not complaining of pain and discomfort in the lumbar back during this whole period.

A. Well, during the latter part of my treatment, his symptoms were more or less concentrated in his upper back and not in his lower back. Obviously, he had some complaints referable to his lower back, to the extent that I felt that he was entitled to a permanent partial disability award. These complaints were not marked, and they were mainly subjective.

Mr. Holland: This period that you are referring to, then, in your answer, means the period of your treatment in the fall of 1948?

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

The Witness: Yes. He was not treated by me during 1949.

Q. (By Mr. Jackson): I see.

A. I saw him, and he was having trouble, and I wanted to see that he got some care, but he came in to see me because he wanted my opinion, and I told him that I didn't think that this related to the condition for which I had treated him, and I gave him the best advice that I could.

Q. Doctor, isn't it a fact that in March of 1949, when he came in to see you in the condition that he was in, he would have a very difficult time holding down a job that would require manual work?

A. I am inclined to think so.

Q. Doctor, I would like to ask you this, are you the physician for Libby, McNeill & Libby? [21]

A. I examine cases at the request of—I examine their injured men at the request of their attorneys. I do not feel that I am particularly the physician for Libby, McNeill & Libby. I have been asked to examine these injured seamen, and fishermen and evaluate their disabilities, and to undertake treatment, and bill for whatever I do.

Q. I was going to ask you also as to whether or not you do examine men going to Alaska for Libby, McNeill & Libby, prior to the time that they go? A. Yes, most of them.

Q. That is, Libby sends the men over to you for examination?

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

A. I examine most of them.

Q. Do you examine for any other packing companies going to Alaska? A. No.

Q. And how long have you been doing that work for Libby, McNeill & Libby?

A. About four years.

Q. And do you do that work on a retainer basis, or do you get paid on an individual basis?

A. I get paid on an individual basis.

Mr. Jackson: That is all.

Redirect Examination

By Mr. Holland:

Q. Doctor, you said in answer to Mr. Jackson's question, that an injury can aggravate an arthritis or an arthritic condition in the spine. And I will ask you whether or not the fact that the site of the injury is different than that where the arthritis is observed, or where the symptoms occur, whether or not a difference in the location of those two has any relation to the probability that the injury itself has aggravated the arthritic condition?

A. Yes. It has a great deal to do with the relationship because [22] we have really not much scientific basis to go on that injuries aggravate arthritis. We do know that in far advanced cases of hypertrophic arthritis that may be causing those symptoms—an injury will cause symptoms to recur. But I feel in those cases the injury should directly

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

affect the particular portion of the spine. I cannot conceive how an injury to one set of joints will cause an injury to another set of joints with hypertrophic arthritis.

Q. Your term of "set of joints," would that be applicable to the lower back on the one hand, and the upper back on the other hand?

A. That is right.

Q. Doctor, you mentioned that the lipping and the spurs which you observed in the X-rays were indicative of the degenerative arthritis of the spine, and that that was a fairly normal occurrence in working men. Would you state just what that arthritis is? In other words, what causes that type of arthritis, and what you mean by the word, "degenerative"?

A. Well, the reaction to wear and tear in the spine causes the corners of the vertebrae in the X-rays to show little spurs. These spurs are due to beginning calcification, and bone formation in the ligaments.

These spurs vary from minute to extensive, and occasionally with the adjacent vertebrae the spurs will continue to form a bridge of bone.

It is an attempt of the body to join up two vertebrae and take the motion away. It is a response to wear and tear. It is a normal occurrence, and it can reach quite a marked stage without symptoms. It is more common in working men. The harder people work, the earlier they get them. We

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

feel that these changes to a slight degree are normal in people over the age of 40, [23] and, as a matter of fact, occur to this extent quite frequently under the age of 40.

They are not a true arthritis. They are not a true result of the inflammation of the joints.

Mr. Holland: I have no other questions.

Recross-Examination

By Mr. Jackson:

Q. Now, Doctor, on the subject of arthritis, if you have an aggravation of arthritis in the lower spine, that can also produce symptoms many times in the upper portion of the spine, isn't that true?

A. Pain in the lower spine can produce symptoms elsewhere. That is perfectly true, but I do not think that they produce this type of thing, where there is pain and spasm and tenderness of the muscles of the upper spine during the period when the condition in the lower spine is subsiding.

Q. Well, would there be a difference among you doctors, as to whether or not an injury such as Mr. Landro had to his spine could produce the symptoms in the upper spine?

A. Well, obviously, there are differences of opinion in everything. All I can give you is my own opinion, based upon examination and experience in treating a lot of back injuries.

Mr. Jackson: I think that is all.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Mr. Holland: That is all. By the way, Doctor, will you agree to the waiving of your signature to this deposition?

The Witness: That is right, I will.

(Witness excused.)

(Deposition concluded.) [24]

CERTIFICATE

State of Washington,
County of King—ss.

I hereby certify that on the 22nd day of June, 1949, before me, E. E. Lescher, a Notary Public in and for the State of Washington, residing at Seattle, Washington, at 602 Central Building, Seattle, King County, Washington, personally appeared, pursuant to stipulation, of Proctors for the respective parties, beginning at the hour of 12:00 o'clock m., Dr. A. Bernard Gray, a witness called on behalf of the defendant in the foregoing entitled matter for the purpose of taking his deposition;

The plaintiff appearing by Roy E. Jackson, Esq., representing Henry Roden, Esq., attorney for the Applicant;

The defendant appearing by Robert V. Holland, Esq. (of Messrs. Bogle, Bogle & Gates), appearing on behalf of R. E. Robertson, Esq., attorney for the defendant.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

The above witness being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, and being carefully examined, deposed and said as in the foregoing transcript of the deposition set out.

I Further Certify that the said deposition has been reduced to typewriting under my personal direction by a competent person, and that said deposition is a correct transcript of the testimony as given by the witness; and that the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Board as required by law.

I Further Certify That the reading over to or by the said witness of his said deposition were by the parties hereto and the witness himself expressly waived.

I Further Certify that I am not of counsel or attorney or proctor for either or any of the parties, nor am I interested in the event of the cause.

Witness My Hand and Official Seal at Seattle, Washington, this 24th day of June, 1949.

[Seal] E. E. LESCHER,
Notary Public in and for the State of Washington,
Residing at Seattle. [26]

EXHIBIT II

Alaska Industrial Board,
Territory of Alaska

JOHN LANDRO,

Applicant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,
Defendant.

BOARD DECISION AND AWARD

Pursuant to the application of the above-named applicant, John Landro and a hearing by the full Board, at which time the applicant was represented by Attorney Henry Roden and the defendant was represented by Attorney R. E. Robertson, the Board considered the case on the merits and finds as follows:

Finding of Fact

1. Applicant, John Landro, was injured on July 5 and July 6, 1948, while employed by defendant employer corporation, Libby, McNeill & Libby, at Clarks Point, Alaska, as a fisherman. Injury resulted from accident in which applicant fell while going between boat and scow on July 5, 1948, and again fell on back in the boat on July 6, 1948, sustaining an injury to his back.

2. Applicant was given medical care by Dr. Fortun, defendant's doctor at Koggiung and was sent

to Seattle for further treatment by Dr. A. Bernard Gray. Medical care was furnished and temporary disability compensation was paid for the period ending September 30, 1948.

3. Subsequent to September 30, 1948, applicant required medical care which he provided at his own expense.

4. Examination by Dr. L. E. Williams, applicant's own physician, applicant's condition was now fixed and rated his at "40% of the maximum for unspecified permanent partial disability." Contrary opinions have been submitted by other medical examiners. [27]

5. That applicant suffered Temporary Total Disability from July 6, 1948, to May 20, 1949.

6. That applicant was paid compensation from August 1, 1948, through September 30, 1948, on the basis of \$17.176 per day.

7. That applicant was in good health prior to the injury and had been working as a fisherman and mate on steamships—both jobs requiring considerable physical activity.

8. That compensation for Temporary Total Disability was not paid from October 1, 1948, to May 20, 1949.

9. That jurisdiction of the Board, the employer-employee relationship and the applicability of the Alaska Workmen's Compensation Act was not in dispute.

Considerations of Applicable Law

1. The A.W.C.A. is applicable, the Board has jurisdiction and an award may issue.

2. Applicant, John Landro, sustained personal injury by accident arising out of and in the course of his employment while rendering service to defendant employer, Libby, McNeill & Libby, a corporation, on June 5 and June 6, 1948.

3. Applicant is entitled to compensation for ensuing Temporary Total disability at the rate of 65% of his average daily wages of \$17.176 from October 1, 1948, to May 20, 1949.

4. Applicant is entitled to necessary medical expenses as provided by the Act.

Award

From the finding of fact and consideration of applicable law as aforesaid, and the files and records in the case, the Board hereby awards applicant John Landro the sum of \$2,577.96, which represents two hundred thirty-one (231) days' Temporary [28] Total Disability Compensation, computed by multiplying \$17.176 (average daily wage) by 231 (representing the period of disability October 1, 1948, to May 20, 1949).

The applicant's present physical condition as to any permanent Total Disability resulting from the injuries of July 5 and July 6, 1948, are in such conflict as to preclude any Board decision or award

at this time and therefore the Board directs the applicant to present himself for an independent medical examination and rating to Dr. H. T. Buckner, 208 Cobb Building, Seattle 1, Washington. Cost of said examination to be borne by defendant employer Libby, McNeill & Libby.

Dated: June 28, 1949, at Juneau, Alaska.

.....,
Chairman. Commissioner of
Labor.

FRANK A. BOYLE,
Member,
Insurance Commissioner,

J. GERALD WILLIAMS,
Member,
Attorney General.

Dated: June 29, 1949, Juneau, Alaska.

I hereby declare this to be a true and correct copy of the above case.

/s/ HENRY A. BENSON,
Commissioner of Labor. [29]

EXHIBIT III

Lowell E. Williams, M.D.

1004 4th & Pike Bldg.

Tel. Eliot 1243

Seattle 1, Wash.

May 20, 1949.

Roy E. Jackson, Attorney at Law,
American Building,
Seattle, Washington.

Re: John Landro.

Dear Mr. Jackson:

Mr. Landro was re-examined today relative to the condition of the low back resulting from injury July 6, 1948.

He has received no treatment since the last examination, March 19th, but has gained about five pounds in weight. His complaints are the same as previously, and the objective physical findings are the same.

Mr. Landro is able to do light work, if any were available, but is not able to perform regular labor.

I would still estimate his disability as 40% of the maximum for unspecified permanent partial disabilities.

Very truly yours,

/s/ L. E. WILLIAMS.

[Endorsed]: Filed July 28, 1949. [30]

STIPULATION TO MAKE JOHN LANDRO
PARTY DEFENDANT

The parties to the above-entitled cause do hereby stipulate and agree that one John Landro may be made a party defendant in the said cause.

Dated the 7th day of October, 1949.

R. E. ROBERTSON,
Attorney for Plaintiff.

J. C. WILLIAMS,
Attorney for Defendant,

By JOHN H. DIMOND,
Assistant Attorney General.

ANSWER OF DEFENDANT

Comes the defendant, John Landro, and in answer to plaintiff's complaint on file in this cause:

Denies each and every the material allegations, matters and things set forth in paragraph nine of said complaint and the whole thereof.

HENRY RODEN,
Attorney for John Landro.

Duly verified.

[Endorsed]: Filed October 26, 1949. [32]

APPLICATION FOR ADJUSTMENT
OF CLAIMTerritory of Alaska
Alaska Industrial Board
Alaska Workmen's Compensation Act

Note:—Either party to the dispute may apply to the Board for adjustment of any matter in difference. The original application and two copies for the defendant must be mailed to Board at Juneau, Alaska. Due notice will thereafter be given of the time and place of hearing. Either party may be represented in person, by agent or by attorney.

JOHN LANDRO,

Applicant,

vs.

LIBBY, McNEILL & LIBBY,

Defendant.

Applicant's address: c/o Savoy Hotel, Seattle, Washington.

Defendant's address: 87 Hanlin Street, Seattle, Washington.

1. John Landro, age 46, while employed as Fisherman on July 5, 1948, at Clark's Point, Alaska, by Libby, McNeill & Libby, who is subject to the Act, sustained injury arising out of and in the course of said employment as follows: Slipped in jumping from scow to boat in rough water, striking lower part of my back on boat, causing severe

pain; on July 6 again fell in boat reinjuring back further; back became very painful, had to stop work, and has resulted in severe injury in lower lumbar back, producing a stiff, painful back and inability to work.

2. Injured left work on July 6, 1948, and disability continued to Present Time.

3. Last payment of compensation on 9-30-48; Last medical furnished by employer on 10-15-48. Notice of Injury given employer on July 6, 1948.

4. Medical and surgical treatment has been rendered by Dr. Bernard Gray, Seattle, Washington; and Company Doctor at Naknek, Alaska.

5. Employee's wages were \$63.98 per day, working Fishermen's hours per day, 6 days per week, plus board of \$1.00 per day. Wages 1948 fishing season from 6-25 to 7-22-48, \$1791.35.

6. Total compensation paid to date, \$680.76 for a period from 8-1-48 to 9-30-48.

7. Injured was Divorced, and had one dependent, as follows: John Landro, age 16.

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this application is: To obtain medical treatment and compensation for disability to back resulting from said injury, and when condition becomes fixed to rate the permanent partial disability.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Seattle, Washington, March 24, 1949.

/s/ JOHN LANDRO,

Applicant.

/s/ ROY E. JACKSON,

Attorney for Applicant. [33]

Alaska Workmen's Compensation Act
Territory of Alaska

Alaska Industrial Board

JOHN LANDRO,

Applicant,

vs.

LIBBY, McNEILL & LIBBY,

Defendant.

ADMISSION OF SERVICE AND ANSWER
TO APPLICATION

The defendant above named for answer to the application herein respectfully shows:

1. It is denied that applicant sustained an injury on or about the date set forth in application.
2. It is admitted that both the employer and

employee were subject to the Alaska Workmen's Compensation Act at the time of the alleged injury.

3. It is admitted that the relationship of employer and employee existed at the time of injury.

4. It is admitted that at the time of the alleged injury the employee was performing service arising out of and in the course of employment.

5. It is admitted that Notice of Injury was given employer as set forth in application.

6. It is denied that the applicant was temporarily disabled for the period stated in the application.

7. It is denied that the applicant was permanently disabled to the extent shown in application.

8. It is denied that the rate of wages as set forth in the application is correct. But that his daily average earnings or wages at the time of his injury were \$17.176 per day, and no more, which exceeded his average daily wages at other times of the year.

9. The defendant will insist that all evidence must be adduced according to legal rules for the admission of evidence and it is otherwise inadmissible, and will object to all ex parte evidence offered to prove or seek to prove any of the facts upon which the claimant bases his claim; and the

defendant will insist upon having a hearing before the full membership of the Board.

LIBBY, McNEILL & LIBBY,
Defendant.

By R. E. ROBERTSON,
Attorney for Defendant.

Dated at Juneau, Alaska, May 26, 1949.

Copy received May 26, 1949.

HENRY RODEN,
For Claimant. [34]

APPELLANT'S OBJECTIONS 4, 5, 6 AND 7
OF JANUARY 27, 1949

Comes now the defendant and objects to the hearing at this time on the following, among other grounds:

4. That it contends that evidence must be adduced in a legal manner, and not ex parte, and is entitled to the right of cross-examination of all of claimant's witnesses.

5. That it demands a hearing before the full board with all members of the board present.

6. That the law does not authorize or permit a hearing to be held upon the extent of alleged temporary disability and a later hearing upon partial permanent disability.

7. That claimant has, if any, only one claim.

Respectfully,

/s/ R. E. ROBERTSON,
Attorney for Defendant.

Copy received June 27, 1949.

HENRY RODEN,
Attorney for Claimant. [35]

DEPOSITION OF DEFENDANT LANDRO

The following people were present:

R. E. ROBERTSON,
Defendant's Attorney.

HENRY RODEN,
Applicant's Attorney.

HENRY A. BENSON,
Commissioner of Labor.

JOHN LANDRO,
Applicant.

Witness was sworn by Commissioner Henry A. Benson.

Q. What is your name?

A. John Landro.

Q. Where do you live, Mr. Landro?

A. 1116 Second Avenue, Seattle.

Q. What did you do during the year 1948?

A. I sailed part of the time and fished up in Bristol Bay, Ekuk Cannery from June 28 till the time I got hurt.

Q. Who did you work for?

A. Libby, McNeill & Libby.

Q. You were hired by Libby under the general Fishermen's Union Agreement?

A. That is correct.

Q. Under that contract they pay you a certain sum of money for the season?

A. It is based on the amount of fish caught and run money besides.

(Deposition of John Landro.)

Q. When did you get to the cannery in 1948?

A. June 28.

Q. When did you start fishing?

A. About 6:30 in the evening of the 28th.

Q. You fished up until when?

A. Up until July 6, 1948.

Q. What happened on that day?

A. On July 5, we fished all day and came back to the tally scow at Clarks Point about 6:30 before we got through delivering the fish. We stopped to get tally books and a bite to eat. [36] Meanwhile the tide changed. It was getting rougher by the minute. The main idea was to get away from the scow before we got smashed up. Jumping from the scow to the boat, I landed on the forecastle head of the boat which gave a heave which threw me off balance and landed on top of the anchor on my back. After this I crawled down from forecastle head into the forecastle after part of the boat. We got away from the scow about 50 to 75 yards and anchored for the night.

I was in great pain and unable to navigate.

Q. When you say navigate what do you mean?

A. I mean to get around in the boat as walking or crawling, etc.

Q. Was it necessary for you to jump off the scow onto the boat and why?

A. Yes, to keep the boat from being smashed up.

On July 6 we made a short drift off the river and I had a hard time to get nets up. I was in

(Deposition of John Landro.)

constant pain. Had to crawl instead of walking. While picking up nets and going towards the back of the boat I again fell on my back and landed across the fore and aft board in the clear room.

Q. Why did you slip there again; what caused it?

A. It was rough and because of my back was in such bad shape. I was unable to keep from falling. When we delivered fish I peved one fish which almost knocked me out. One of the other men had to do the rest of it.

We anchored away from the barge, as it was rough and I was in no condition to continue fishing. The next morning we went into the cannery.

Q. What did you do after you got to the cannery?

A. Went to the hospital. I was given heat treatments in morning. I was not able to go back to work. I rested in bunkhouse. I was taken into the hospital that evening.

Q. How long did you stay in the hospital?

A. From July 7 till July 14, received heat treatments and pills. Was then taken into Koggiung to Dr. Fortun. [37]

Q. Did Dr. Fortun examine you?

A. I went to the hospital and was put to bed. I was not examined until next morning. He removed taping by nurse at Ekuk, gave injections and pills to relieve pain.

Q. How long did you stay there?

(Deposition of John Landro.)

A. Until July 19 or 20. I left for Seattle.

Q. What condition were you in when you left Koggiung?

A. I was in terrible condition. It was terrible to get around, if I walked 25 yards to mess room, found it impossible to straighten up.

Q. What happened in Seattle?

A. I arrived the 21st or 22nd. I saw Dr. Williams on 23rd. I Dr. Gray.

Q. Dr. Gray is the insurance company doctor?

A. That is what I understand. He X-rayed me and examined my back. The doctor told me "you have a pretty bad back there," some bruises and bump. He said he could find no fracture. At the hospital I received injection, pills and physiotherapy treatments.

Q. Did you get any relief from these treatments?

A. About July 27 I was X-rayed again at Providence Hospital. Dr. Gray told me again that he did not find any fracture but it appeared that a vertebra was dislocated; opening in one side.

Dr. Gray told me I would be all right after a while.

They gave me injections and pills while I remained there and on July 31, Dr. Gray told me I could get by staying at home and coming in for injections. This I did for a week and had a terrible time getting around. Dr. Gray sent me for physiotherapy and massage 3 times a week at Provi-

(Deposition of John Landro.)

dence Hospital; twice a week for injections at his office. October 14 discontinued physiotherapy and injections; advised finding some light work. [38]

I tried to get light but none was obtained.

I saw Dr. Gray around the end of October. He asked me to report back in 10 days or 2 weeks. I reported back the middle of November. Gray advised me to go south to a warmer climate. I went to California to get relief but obtained none.

January 15, 1949, back was in bad shape. I tried to do various light work around the place to strengthen my back. I had sharp pains in the lower back when I attempted to pick up tools also my legs would buckle up on me and I would collapse. That happened 3 times on street stepping off sidewalk and 3 or 4 times at the house picking up tools.

First of February, 1949, went to see Dr. Le Cocq for examination. He found my back in pretty bad shape. Told me that I might have to have an operation. About the same time I saw Dr. Williams who also advised to have treatment as the back was in bad shape. I was confined to the house for three weeks because of the icy and slushy streets. I could not get around. It was between three and five weeks.

I saw Dr. Gray in middle of March, said I should have some treatment but he said he was informed by the Insurance Company that they would not pay for any more treatment. However, he said you should be entitled to some treatment at Harborview

(Deposition of John Landro.)

Hospital which is run by the county and gave me a note to report there for injection for physiotherapy and injection treatment.

Q. Did you go down to Harborview Hospital?

A. No. I neglected to go there. It is a charity hospital. I felt that insurance company should pay the bills in this case. I went to a hot springs which was recommended for this type of back injury. The name of the Hot Spring was St. Martin in Oregon. I mean Washington.

Was there 3 weeks taking hot baths and massage. Helped [39] temporarily. I returned to Seattle and attempted to find light work which I was unable to do.

Q. What is your condition at the present time?

A. It is up and down. It is not good at all. It is such that I could not do any hard work of pulling. There are days that I might be able to do light work but other days I couldn't begin to do any work at all.

Q. Why can't you?

A. Due to the condition of my back.

Q. How are your legs?

A. They pain me walking and after walking pains shoot down both legs. The hips pain all the time.

Q. At present time you are wearing a brace?

A. Yes, I am.

Q. Who prescribed it?

A. Dr. Gray. Dr. LeCocq adjusted the brace at

(Deposition of John Landro.)

later date and I have been wearing it ever since. It supports my back to some extent.

Q. How do you get along if you don't wear the brace?

A. I have tried to walk across street but it gives more pains—lower back and hips.

Q. What sort or type of work did you do up to this accident? A. Fishing and sailing.

Q. In the first part of 1948 what kind of work did you do?

A. Sailing then, Liberty ships over to Germany and Europe.

Q. What kind of a job did you have at that time?

A. At that time I was mate—first mate.

Q. What was the kind and nature of your work?

A. First mate's duties includes upkeep of the vessel and everything in general, tanks, crating, seeing the ship is in good shape for loading and unloading cargo. You are in and out of the holds while cargo is being loaded. [40]

Q. Can you do that kind of work now?

A. I won't be able to do this kind of work since injury I had in Alaska.

Q. Why can't you do it?

A. I haven't the strength to be in and out of holds as my back gives in on me and my legs won't allow me to stand on them for any period of time. I couldn't crawl down into the holds over tanks and into bilges and what have you.

(Deposition of John Landro.)

Q. Can you do the work of a fisherman as you have in the past?

A. That would be suicide for me to go in the fishing fleet. I couldn't possibly do the work.

Q. To the best of your judgment tell us how much of your earning ability—your ability to work have you lost?

A. I don't know what kind of light work I can do. Today I would say I wouldn't be able to do one-fourth of what I could do previous to injury.

Q. What kind of light work have you tried to get?

A. I applied to watchman. I tried to get job as mate but naturally had to explain about my back which would not be able to go in and out of holds. Also applied for checkers job on waterfront. Tried several factories.

Q. Before this accident did you ever suffer from any disease?

A. No.

Q. Did you ever have an accident before?

A. No, I didn't.

Q. Did you ever have to lay off from work because of sickness?

A. No.

Q. Tell us for the year 1948 up until the time this accident happened, how much money did you earn?

A. Beginning of the year making an average \$582.00 a month. Decided to go to navigation in order to increase my earning power. I spent about 2 months at this. At that time I could have [41]

(Deposition of John Landro.)

shipped out with the company I was with but decided to go fishing instead. Part-time work in May.

Q. How much did Libby, McNeill and Libby pay you for the season?

A. \$1,972.00 for the season at Ekuk cannery covering two months.

Q. How much did you earn before the season and if you had not attended navigation you could have earned how much? A. \$582.00 a month.

Q. What kind of work did you do in 1947?

A. I was sailing as mate in 1947.

Q. For the whole year?

A. For about 11 months, I lost some time changing ships.

Q. What was average monthly wages for 1947?

A. \$582.00 for 11 months.

Q. What was average for 1946?

A. (Interruption by defendant's attorney protesting this line of questioning.)

Q. Did you ever suffer rheumatism or arthritis prior to this injury? A. No, I did not.

Q. Dr. Fortun is the doctor that examined you where? A. Yes, at Koggiung.

Q. There was one statement made by the doctor in his deposition that you objected to?

A. Yes, Dr. Fortun stated that I receive physiotherapy treatments at Koggiung which is not so.

Q. You have one child under 18 years—how old?

A. 16 years old—son.

(Deposition of John Landro.)

Q. What statement do you object to of Dr. Fortun?

A. The statement that I received physiotherapy treatments at Koggiung.

Q. Mr. Landro is this receipt for \$680.70 compensation already paid? A. Yes. [42]

Q. Did you receive any other check from Libby, McNeill & Libby? A. No, sir.

Q. Weren't there run money of \$1,791.45?

A. That is correct, I didn't understand your point. We were late in arriving at the fishing grounds.

Q. Libby paid you \$1731.45 plus \$150.00 for season's wages? A. Yes, that is correct.

Q. During 1947, August, September and October, you worked as a mate for Pope and Talbot at \$582.00 per month? A. Yes.

Q. For the first half of month of January, 1948, you worked for same company? A. Yes.

Q. After middle you went to navigation school?

A. That is right.

Q. During that time you were not earning any wages? A. That's correct.

Q. Is it not true that during the month of May, 1948, you worked as relief mate on various vessels at \$1.85 per hour? A. Yes.

Q. That was before you left Seattle to go up to Ekuk to fish? A. Yes.

Q. How much did you earn as relief mate at \$1.85 per hour?

(Deposition of John Landro.)

A. Less than \$100 during the month of May.

Q. When you first got off the boat and went ashore at Ekuk Cannery on July 6th, after you slipped a second time, I understand that you received treatments there? A. A nurse.

Q. Was it Ann Morgan? A. It might be.

Q. Did you tell the registered nurse at that hospital that you became injured wrestling with the nets; in center table [43] of clearing room and hurt my back on board?

A. It could have been in that line.

Q. Did you tell the bookkeeper the same story?

A. Yes.

Q. Did the nurse examine your back at that time?

A. I can't say she examined it, she looked it over.

Q. What kind of heat treatments did she apply to your back?

A. An electric pad also massages and lamps.

Q. This accident occurred on the Nushagak River? A. Yes.

Q. How far off shore?

A. Middle of channel off Clark Point.

Q. Do you fish a seven day week?

A. Now we have time off, 36 hours off over weekend, 24 hours over Wednesday.

Q. Did you fish in 1947 season? A. No.

Q. Didn't Dr. Gray advise you to go to Harborview Hospital for an arthritic condition?

(Deposition of John Landro.)

A. I hesitated to go down to the county hospital, because I thought that the insurance company should take care of it.

Q. Could you have gotten a job on the boats after the fishing season?

A. Yes. I feel sure I could have.

Q. How much would you have made?

A. \$582.00 a month or more. The company I formerly worked for would have taken me back as they highly recommended me.

Q. Did you get your master's papers as a result of schooling? A. Yes.

(The defendant's attorney stated that there was no dispute as to whether the applicant could have earned the amount of money stated.)

Q. Have you ever fished Bristol Bay before?

A. Yes, this is my sixth season. Last season was in 1939.

Q. Did you fish for Libby all the time?

A. For different companies.

Q. Did you ever have an accident before this or have trouble with your back? A. No.

Q. Did you ever have pain in lower back?

A. No.

Q. You haven't done any work since accident?

A. No.

Q. Because of the fact you couldn't find light work?

A. Two-thirds of the time I couldn't even do light work.

(Deposition of John Landro.)

Q. Did Dr. Le Cocq tell you that you could do light work now that your brace is fitted properly?

A. No.

Q. When did Dr. Le Cocq say you would be able to go back to work? A. He didn't say.

Q. Did he recommend light work?

A. No. He recommended treatments.

Q. Did you see anyone except Le Cocq?

A. Dr. Williams.

Q. Did you notice any pain while pulling nets?

A. No. No pain.

Q. Did you fall on the back or just fall?

A. Yes, I fell on the back. I hit the back.

Q. How many doctors have you been to on this case? A. Four.

Q. Did you have an operation for a peptic ulcer in 1926? A. Yes.

Q. In 1929 weren't you treated for compound fracture?

A. Yes. It was so long ago I had forgotten it.

DEPOSITION OF O. J. FORTUN

Appearances:

HENRY RODEN, ESQ.,

ROY E. JACKSON, ESQ.,

Associate Counsel,

For the Applicant.

R. E. ROBERTSON, ESQ.,

ROBERT V. HOLLAND, ESQ., of

BOGLE, BOGLE & GATES,

For the Defendant.

Deposition of Dr. O. J. Fortun, a witness of lawful age, taken on behalf of the Defendant in the above-entitled cause pending before the Alaska Industrial Board, pursuant to oral agreement of counsel for the respective parties, before H. W. Boylan, a Notary Public in and for the State of Washington, at 603 Central Building, Seattle, Washington, on the 23rd day of May, 1949.

It was stipulated by and between counsel for the respective parties that all objections except as to the form of questions or the responsiveness of the answers thereto are reserved until the deposition is offered in evidence at the time of trial.

O. J. FORTUN

a witness called on behalf of the Defendant, being

of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Holland:

Q. State your name, please.

A. O. J. Fortun.

Q. Where do you live, Doctor?

A. 8509 Greenwood Avenue.

Q. What is your occupation?

A. Physician and surgeon.

Q. Where is your place of business? [46]

A. 8509 Greenwood.

Q. You live and work in the same place?

A. No, I don't live there, that is my office.

Q. You live in Seattle?

A. Live in Seattle, yes.

Q. How long have you held a license to practice medicine? A. About 30 years—close to it.

Q. Are you duly and regularly licensed to practice in the State of Washington? A. I am.

Q. Where did you obtain your medical degree?

A. Chicago.

Q. Where was that?

A. I was mostly at the University of Chicago but I got my diploma from Loyola University.

Q. Did you take any other education following receipt of your diploma, Doctor?

A. I had it before.

Q. Your previous education?

A. Yes, I spent the year 1900 at the University

(Deposition of O. J. Fortun.)

of Berlin and in 1913 I spent half a year in London in the hospitals there.

Q. On those occasions were you specializing in any field at all, Doctor? A. No, in general.

Q. General practice, yes?

A. General practice, yes.

Q. Have you been practicing since you obtained your license? A. Yes, steadily.

Q. Was that general practice, Doctor?

A. Yes, yes.

Q. When did you first work for Libby, McNeill and Libby?

A. That was in 1947, because I couldn't find an office in Seattle. [47]

Q. And at that time where did you work for them? A. At Koggiung.

Q. Prior to that time what had you been doing?

A. Been out in one of the clinics in Seattle.

Q. How long had you been with that clinic, Doctor?

A. Five years, I think—four years, anyhow. Before that 20 years in Everett.

Q. Prior to the clinic you were 20 years in Everett? A. Yes.

Q. Were you in a clinic in Everett or by yourself?

A. By myself. I had a man with me sometimes.

Q. Doctor, do you recall a Libby workman during the 1948 season named John Landro?

A. I do.

(Deposition of O. J. Fortun.)

Q. Did you examine or treat him at any time?

A. I did.

Q. In what way did knowledge of this man's condition first come to you?

A. Well, he was sent from Ekuk to the hospital at Koggiung and I treated him—examined him and treated him and found that he had a back that was, in a general term, sometimes called lumbago from exposure to rain and cold winds.

Q. Was there a hospital, did you say, at Koggiung? A. Yes.

Q. Who operated that hospital?

A. Well, it was Libby and McNeill—I was in charge of it.

Q. How large was that hospital in terms of beds?

A. Oh, I think 12—I don't remember exactly now.

Q. When did you make your first examination of Landro in relation to when you first saw him at Koggiung?

A. He came in the evening and that was the 14th of July and I think—really, I looked him over the 15th. [48]

Q. The following day?

A. Yes, the following day.

Q. What was his condition when he arrived at Koggiung as to whether or not he was ambulatory?

A. Well, he was able to walk from the plane to the hospital.

(Deposition of O. J. Fortun.)

Q. Did you give any treatment to this man following your examination? A. Yes.

Q. State briefly what you did.

A. Salicilates and physiotherapy.

Q. Over what period of time, Doctor?

A. About four days.

Q. During that time where was the man?

A. In the hospital.

Q. Would you describe the physiotherapy that was given?

A. Well, of course, it was mostly infra-red light and massage—things you give for a sore back.

Q. And after the four-day period what occurred, if anything?

A. Well, he stated to me he wasn't getting any better, so I realized that he wasn't going out fishing again and I advised the superintendent to send him to the hospital to Seattle or whatever they wanted.

Q. Did you form any conclusions at that time as to whether his condition was from a natural ailment or from injury?

A. Well, I couldn't make out any injury but the man was sick—sure he was.

Q. Did you find any external evidence on the skin of any injury, Doctor? A. No, I didn't.

Q. Did you make an examination for such condition? A. Yes, certainly.

Q. Following the four-day period, what was done with the man?

A. He was sent to Seattle, I think.

(Deposition of O. J. Fortun.)

Q. Did you see him at any time after that? [49]

A. No, no.

Q. Did you obtain any history at all, Doctor, of the man's immediate past?

A. Well, so many would come in and claim they fell down in the boat where I couldn't find any injury and as a rule they would go out again and continue fishing.

Mr. Holland: Would you mark this for identification?

(Document referred to marked Defendant's Exhibit 1 for identification.)

Q. Handing you what has been marked Defendant's Exhibit 1, would you state what that is?

A. That is the letter to the office manager in Seattle at the time he left.

Q. By whom was that letter written?

A. That was written by me.

Q. Is that the original of the letter written by you, Doctor? A. It is.

Q. Is that your signature down at the foot of that letter? A. It is.

Mr. Holland: I will offer that in evidence or you may reserve your objections until the time of hearing if you wish. In any event I will offer it now.

Mr. Jackson: All right—we object to it on the grounds it is wholly immaterial. The man's claim was recognized by the company, he was placed in the hospital and treated for an accident upon arrival in Seattle where he spent a period of time in Provi-

(Deposition of O. J. Fortun.)

dence Hospital and Dr. Gray has treated him for an injury——

Mr. Holland: Well, you don't argue the case on your objection. That is all I have.

The Witness: Of course we were handicapped. We didn't have any chance for an X-ray. [50]

Cross-Examination

By Mr. Jackson:

Q. Doctor, what is that hospital up there—sort of a first aid station?

A. Well, it is supposed to be a little more.

Q. A little more? A. Yes.

Q. And in your practice here, what clinic were you with, Doctor? A. Bridge.

Q. And then you couldn't find any office in 1947 and didn't work in 1947 except what you——

A. Well, I quit the clinic in the first part of 1947 and began to look for an office, then when I couldn't find any office I went up for Libby.

Q. How old a man are you, Doctor?

A. Oh, I am past 70.

Q. You say you are past 70—how old?

A. 74—exactly.

Q. Where were you located here in town for the Bridge Clinic?

A. That is on Summit Avenue.

Q. Were you up here with Dr. Pieroth?

A. Yes.

(Deposition of O. J. Fortun.)

Q. Now, Doctor, when Mr. Landro came to you on—you say July 14th, 1948? A. Yes.

Q. He told you at that time, did he, that he had had an accident?

A. He did. He told me he fell down in the boat.

Q. And injured his back?

A. Well, he had a bad back.

Q. He had a bad back? A. Yes.

Q. Now, what facilities did you have in that hospital—did you have any facilities there to determine whether or not he had had a spine injury?

A. No, we didn't have any X-ray. We had a fluoroscope but you see that wouldn't do any good so I didn't use it because a man under those conditions should have an X-ray.

Q. You had no X-ray there? A. No, no.

Q. So I take it then that he had a spasm of muscles in the back? A. Yes, I grant that.

Q. And he was a pretty sick man?

A. Well, I said that he was sick.

Q. And he was in bed practically the whole time he was there in the hospital?

A. Well, I wanted him to stay in bed.

Q. Yes, and it was a matter of trying to improve his condition, you felt rest was one of the things that might improve his back? A. Yes.

Q. And after he was there four days it appeared that he was not improving, is that correct?

A. Yes.

Q. And it was decided that probably the best thing to do would be to send him out?

(Deposition of O. J. Fortun.)

A. Yes.

Q. Where he could get proper medical attention?

A. Yes.

Q. Is that correct?

A. Well, that was the idea, that we couldn't do any more for him.

Q. And you would have to have X-rays taken to determine what, if anything, could be done——

A. That is the proper thing.

Q. ——to assist him? A. Yes.

Q. Is that correct? A. Yes. [52]

Q. And that is the reason you recommended he be sent out? A. Yes.

Q. Now, Doctor, are you a specialist in treating spinal injuries?

A. No, I don't claim to be that.

Q. And if you have a case that comes into your office that involves a spine injury, what generally do you do? A. Take an X-ray.

Q. I mean do you refer the case to someone else?

A. Well, it depends on what the X-ray shows.

Q. Yes, but before you make any determination as to what is wrong you have to have an X-ray taken? A. Yes, yes.

Q. And you don't just look at a man's back when he comes in and tells you he has an injury?

A. Well, of course, there are lots of things that indicate to us—even before we didn't have any X-rays I was practicing medicine and I can determine whether or not a bone is broken and naturally

(Deposition of O. J. Fortun.)

the X-ray makes things so much more simple. That is why we have to be careful about our fingers, that is why I don't go out and do any bricklaying or things like that because then the sensitiveness of the fingers wouldn't be there. That is why with appendicitis you can determine those things by touch.

Q. Doctor, do you have any knowledge of arthritis? A. All there is to be known.

Q. You know everything there is to be known?

A. Yes, because my wife has arthritis.

Q. What effect does an injury to the back have on arthritis? A. Well, it aggravates it.

Q. Aggravates it? A. Yes.

Q. And makes it worse? A. Yes. [53]

Q. Is arthritis a painful condition when it is aggravated? A. Certainly.

Q. And you can have arthritis if it is dormant it doesn't cause you any trouble?

A. Well, of course, it causes a certain amount of stiffness and inconvenience.

Q. Well, I mean if it is not bothering you.

A. In the line of pain?

Q. That is what I mean. A. Yes.

Q. But if you aggravate it by injury it can become very painful? A. Yes, yes.

Q. You haven't had occasion to review any of the X-rays that were taken of Mr. Landro?

A. No, I haven't.

Q. You know nothing more about this case than what you saw in the first four days? A. No.

(Deposition of O. J. Fortun.)

Q. That is all you know about it?

A. That is all I know.

Q. And you felt that when Mr. Landro went out from Alaska that he was in need of further treatment?

A. Well, that was one thing I didn't make up my mind about.

Q. Well, he was in pretty bad shape when he left there, wasn't he?

A. Well, the thing is he was in about the same shape as when he came.

Q. I see—that is, he didn't improve?

A. No, I wouldn't say that he improved.

Q. And he was a pretty sick man when he came in and a pretty sick man when he came out?

A. Well, he was able to walk.

Q. But it was very difficult for him to get around?

A. Well, I don't say it was so difficult for him but he [54] naturally—I realized he was uncomfortable. Of course, we had such nasty weather with wind and rain and there was so much of that misery among the fishermen, you see, at the time, and I told Landro that he certainly was wise in quitting because it was a dog's life and he wasn't built for being a fisherman.

Q. Well, now, having had an injured back as he described it to you, he was in need of treatment, there isn't any question about that?

A. Well, I have no opinion just what things

(Deposition of O. J. Fortun.)

would be after he left there, you see, because up there it was cold and dreary and miserable conditions.

Q. But isn't this a fact, that he was in need of treatment when he left there, for his back?

A. Well, the treatments we had given didn't seem to help him any, so that is why I didn't know if any treatment would do him any good at all.

Q. But you didn't have anything to treat him with there?

A. I had everything except X-ray.

Q. But you didn't know what was in his spine?

A. Well, I know everything there is written about arthritis.

Q. Well, I am asking you this——

A. But so far as to tell what was in his spine that is expecting too much, like telling what is in your head—I can't do it.

Q. I mean, without the X-ray studies you were unable to make a definite diagnosis?

A. I was unable to make out any injury, that's right.

Q. I mean you were not able to make a definite diagnosis?

A. Well, I made a diagnosis in my mind as far as a man might judge—qualified me to do.

Q. Doctor, what is lumbago?

A. It is inflammation of the muscles that have to do with the back and when I put my fingers on those muscles I could tell right away which muscle it is because they are tense, they have lost [55]

(Deposition of O. J. Fortun.)

their elasticity and the tenseness and cramping causing a pinching of the nerve endings and causes aching.

Q. And when the muscle becomes stiff like that it is in spasm? A. Yes.

Q. And that shows there is a painful muscle?

A. Certainly.

Q. And when you have an aggravation of an arthritis you have painful muscles, too?

A. Yes, yes.

Q. And you have the same type of spasm?

A. Yes.

Q. Is that correct? A. Oh, that is correct.

Mr. Jackson: I think that is all.

Redirect Examination

By Mr. Holland:

Q. Doctor, was any discussion had between you and the man, himself, concerning his leaving Koggiung and returning to the United States?

A. Well, no, I couldn't say exactly. I just told him that if I was in his place I would quit, absolutely quit because it was a dog's life to be a fisherman up there the way it was, you see, and I had so many of those strong, husky fellows even who came in with back pain that he wasn't the only one. Usually after a few days we had them out fishing again.

Mr. Holland: I have no further questions.

Mr. Jackson: That is all.

(Deposition concluded.) [56]

Certificate

State of Washington,
County of King—ss.

I, H. W. Boylan, a Notary Public duly commissioned and qualified in and for the State of Washington, do certify that, pursuant to oral agreement in and for the State of Washington, do hereby certify that, pursuant to oral agreement of counsel for the respective parties, there came before me on the 23rd day of May, 1949, at 1:00 o'clock p.m., at 603 Central Building, Seattle, Washington, the following named person, to wit, O. J. Fortun, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing under my supervision;

That the deposition is a true record of the testimony given by the witness; and that the reading over by or to the said witness of his said deposition, and his subscription thereto, were by counsel for the respective parties expressly waived.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In Witness Whereof I have hereunto set my hand

and affixed my notarial seal this 23rd day of May, 1949.

[Seal] H. W BOYLAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

My commission expires March 6, 1950. [57]

MINUTE ORDER OF JANUARY 18, 1950
JOURNAL No. 19, PAGE 360

These cases came before the court for hearing on plaintiff's appeal from the decision of the Industrial Board. R. E. Robertson appeared for plaintiff and Henry Roden appeared in behalf of the claimants. Mr. Robertson argued plaintiff's case at great length, closing the same at 5:10 p.m.

DISTRICT COURT'S OPINION

R. E. ROBERTSON,

Attorney for Plaintiff.

J. GERALD WILLIAMS,

Attorney General of Alaska.

JOHN DIMOND,

Assistant Attorney General of Alaska, for
Alaska Industrial Board, and

HENRY RODEN,

For John Landro, Defendants.

This is a proceeding to set aside an award of compensation to John Landro for temporary disability.

Finding that Landro injured his back as a result of falls on July 5th and 6th, 1948, and sustained temporary disability to May 20, 1949, the Alaska Industrial Board awarded him \$2,577.96, and, holding that it was unable, in view of the conflict in the evidence, to make any determination as to permanent disability, the Board ordered a further physical examination at the expense of plaintiff-employer.

The questions argued are:

(1) Whether the Board is empowered to order the plaintiff, as employer, to pay for a medical examination after the expiration of a year from the date of the injury.

(2) Whether the Board may postpone determining the degree of permanent disability, after making an award for temporary disability; and

(3) Whether the findings of the Board as to temporary disability is supported by any substantial evidence.

I am of the opinion that under Section 43-3-2 ACLA, 1949, the cost of examination ordered by the Board must be borne by it instead of the plaintiff.

In the absence of statutory provision, the second question must be decided on general considerations. It should be borne in mind that a proceeding of this kind is *sui generis* and that the primary purpose of statute is to make just provision by way of compensation for disability. It may not, therefore, be analogized to the ordinary civil [59] action so far as postponing decision is concerned. I am of the opinion that the Board is authorized to continue the determination of permanent disability if the evidence before it, or lack thereof, appears to warrant such action.

As to the third point, it may be conceded that the evidence preponderates in plaintiff's favor; but it is settled that the administrative body such as the Alaska Industrial Board is not bound to accept the opinion or theory of the employer's medical experts, even though uncontradicted, as against the evidence of the employee. The Court cannot say from an

examination of the testimony of Landro that it is insufficient to sustain the award.

GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed February 23, 1950.

JUDGMENT

This cause came on regularly for hearing before the Court on appeal by plaintiff corporation from a decision and award rendered and made by the Alaska Industrial Board on June 28, 1949, in a proceeding then pending before said Board wherein it awarded to the defendant John Landro temporary disability compensation in the sum of \$2577.96 for the period from October 1, 1948, to May 20, 1949, both inclusive, at the rate of 65% of \$17.176, his average daily wage, or \$11.16 for 231 days, which average daily wage he earned prior to sustaining disability arising out of and in the course of his employment by plaintiff; and

It appearing that the defendant Landro has asserted a claim not only for temporary total disability but also partial permanent disability, but that, while no award has been yet made on the partial permanent disability claim, no just reason exists for delaying the entry of judgment sustaining the defendant Board's award for temporary total disability, it is ordered and directed that judgment now be entered sustaining the defendant

Board's award to the defendant Landro for temporary total disability.

Now, Therefore, upon consideration of the evidence submitted and the argument of counsel for the respective parties the Court finds that there is sufficient evidence to suport the findings and award of the said Board and the same are hereby affirmed, and

It Is Ordered, Adjudged and Decreed that defendant John Landro do have and recover of and from the plaintiff the sum of \$2577.96 which became due and payable in monthly installments of \$334.80, commencing November 1, 1948, up to and including May 20, 1949, together with interest at the rate of eight per cent per annum on the respective amounts from the time the same became due and payable up to the time the same are paid, making the total sum of \$2805.00 now due and owing said defendant John Landro from said plaintiff, and

It is further Ordered, Adjudged and Decree that plaintiff do have and recover of and from said plaintiff corporation all expenses incurred by him for medical and hospital treatment by reason of said injury for the period of one year from and after July 6, 1948, together with his costs and disbursements herein including an attorney's fee in the sum of \$200.00.

Done in open court, at Juneau, Alaska, this 24th day of March, 1950.

GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed March 24, 1950. [62]

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from that certain Final Judgment entered in the above-entitled cause on March 24, 1950.

Dated at Juneau, Alaska, this 28th day of March, 1950.

R. E. ROBERTSON,
Attorney for Plaintiff.

Copy received March 31, 1950.

HENRY RODEN,
Attorney for Defendant
Landro.

[Endorsed]: Filed April 3, 1950. [63]

SUPERSEDEAS ON APPEAL

Whereas, Libby, McNeill & Libby, the plaintiff corporation in the above action, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment rendered against it in the above action by the District Court for the Territory of Alaska, First Judicial Division, on March 24, 1950, in favor of the defendant John Landro for total temporary disability compensation of \$2,805.00 under the Workmen's Compensation Law of Alaska, and for all expenses incurred by said defendant for medical and hospital

treatment by reason of his injury for the period of one year from and after July 6, 1948, together with his costs and disbursements herein including an attorney's fee of \$200.00; and

Whereas said plaintiff is desirous of staying the execution of said judgment so appealed from, and the defendants have agreed that the penal amount of the supersedeas shall be \$3,500.00.

Now, Therefore, in consideration of the premises and such appeal, we Libby, McNeill & Libby, plaintiff corporation, as Principal, and the Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland and engaged in and authorized to engage in business in the Territory of Alaska, as Surety, do hereby jointly and severally undertake and promise, and acknowledge ourselves bound in the sum of \$3,500.00 that the plaintiff corporation Libby, McNeill & Libby will satisfy said judgment in full, together with all costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and will satisfy in full such modification of said judgment and such costs, interest, and damages, as the appellate court may adjudge and award.

In Witness Whereof Libby, McNeill & Libby, plaintiff corporation, as Principal, and Maryland Casualty Company, a corporation, as Surety, have caused these presents to be executed this 29th day of March, 1950, in Juneau, Alaska. [64]

Executed in the presence of:

EILEEN ROBERSON,
F. O. EASTAUGH,
DORA M. SWEENEY,
SHIRLEY M. CADY.

LIBBY, McNEILL & LIBBY,
Principal.

By R. E. ROBERTSON,
Its Attorney and Agent.

MARYLAND CASUALTY
COMPANY,
Surety.

[Seal] By ALLEN SHATTUCK,
Its Attorney-in-Fact and
Agent.

Attest: Corporate Seal.

United States of America,
Territory of Alaska—ss.

Acknowledged before me this 29th day of March, 1950, in Juneau, Alaska, by R. E. Robertson as attorney and agent of the plaintiff corporation Libby, McNeill & Libby as its free and voluntary act and deed and by Allen Shattuck as attorney-in-fact and agent on behalf of the Maryland Casualty Company, a corporation, surety, as the latter's free and voluntary act and deed.

Witness my hand and the official seal the day and year herein first written.

[Seal] FREDERICK O. EASTAUGH,
Notary Public for Alaska.

My Commission Expires June 10, 1950.

Approved as to form, amount, and sufficiency of surety this 31st day of March, 1950.

HENRY RODEN,
Attorney for Defendant John Landro.

Approved and appeal allowed this 3rd day of April, 1950, at Ketchikan, Alaska.

GEORGE W. FOLTA,
Judge of the District Court for the Territoy of Alaska, Division No. 1.

[Endorsed]: Filed April 3, 1950. [65]

STATEMENT OF POINTS

Plaintiff corporation, Libby, McNeill & Libby, appellant herein, intends to rely upon the following points on appeal.

1. Under the Workmen's Compensation Act of Alaska the Alaska Industrial Board's findings, decision and award must be based upon competent evidence according to the weight of such competent evidence, and not upon ex parte, hearsay, unverified, or other incompetent evidence, whereas the

Board's decision and award and its findings herein were based upon ex parte, hearsay, unverified, or other incompetent evidence and therefore were not conclusive upon the District Court.

2. The only competent evidence adduced at the hearing before the Alaska Industrial Board proved that Landro's total temporary disability ended on October 1, 1948, to which date he was paid compensation of \$680.76, whereas the Board's decision and award as well as the District Court's judgment held he also suffered total temporary disability from October 1, 1948, until May 20, 1949, and was entitled to compensation therefor of \$2805.00 which includes interest computed upon monthly payments to March 24, 1950.

3. The only competent evidence adduced at the hearing before the Alaska Industrial Board proved that Landro suffered 10% permanent disability from an injury by accident arising out of and in the course of his employment, for which he was entitled to be paid compensation, computed according to the statute, after first crediting thereon \$680.76 already paid him as total temporary disability compensation, whereas the Board's decision and award as well as the District Court's judgment held that Landro's percentage of partial permanent disability was not established at the hearing and reserved the determination thereof for a future hearing before the Board, notwithstanding the Workmen's Compensation Act of Alaska does not authorize or empower the Board to determine tem-

porary total disability and to award compensation therefor [66] but to disregard the weight of competent evidence as to percentage of permanent disability and to reserve the determination thereof for a future hearing.

4. The District Court's judgment disregarded the fact that the Alaska Industrial Board's decision and award and its findings were based solely upon ex parte, hearsay, unverified or other incompetent evidence, and were against the weight of the only competent evidence adduced at the hearing before the Board, and were not conclusive upon the Court, particularly in respect to:

(a) Finding Landro suffered total temporary disability to May 20, 1949, instead of to October 1, 1948, only.

(b) Awarding Landro total temporary disability compensation of \$2805.00 (which includes 8% interest upon monthly payments computed to March 24, 1950) to be paid him, instead of finding Landro was entitled to no compensation except \$680.76 only which had already been paid him.

(c) Finding that the evidence at the hearing was in such conflict that the percentage, if any, of Landro's permanent disability could not be determined, instead of finding that the only competent evidence adduced at the hearing proved that Landro suffered 10% permanent disability and was entitled therefor to compensation, computed according to the statute, after first crediting thereon \$680.76 total temporary disability compensation already paid him.

5. The Workmen's Compensation Act of Alaska does not authorize or provide for the award for the same injury to the same employee not only of Temporary, either partial or total, disability compensation but also of permanent, either partial or total, disability compensation arising by accident out of and in the course of his employment, whereas the District Court's judgment as well as the Alaska Industrial Board's decision and award allowed Landro, who sustained only one injury in the [67] same accident, total temporary disability compensation up to May 20, 1949, but reserved the determination of Landro's percentage of permanent disability to a later hearing before the Board.

6. The District Court was without jurisdiction to allow and assess an attorney's fee of \$200.00, or any sum, to Landro for services of his attorney in the proceedings before that Court.

R. E. ROBERTSON,
Attorney for Plaintiff
Appellant.

Copy received April 18, 1950.

HENRY RODEN,
Attorney for Defendant John
Landro.

J. GERALD WILLIAMS,
Attorney General for Alaska and Attorney for
Alaska Industrial Board.

[Endorsed]: Filed April 18, 1950. [68]

ALL DOCKET ENTRIES IN No. 6139-A

1949

Aug. 6—Case transferred from Anchorage.

Oct. 26—Defendant's Answer filed.

1950

Jan. 11—Motion to set for hearing filed.

Jan. 13—Minute Order—Case set for hearing to follow 6075-A or about Wednesday next.

Jan. 21—Brief of Plaintiff filed.

Jan. 18—Minute Order—Case before Court for argument on appeal.

Jan. 19—Minute Order—Argument continued on Alaska Industrial Board file filed. Under advisement.

Feb. 8—Received from M. E. S. Brunelle, Clerk at Anchorage.

Mar. 16—Motion for Judgment filed.

Mar. 24—Minute Order—Upon Claimant's Motion for Judgment Court signed same. Court set Supersedeas Bond at \$3,500 with which attorney for Landro concurred.

Mar. 24—Judgment filed and entered.

Apr. 3—Notice of Appeal filed. Copy served on Alaska Industrial Board.

Apr. 3—Supersedeas on Appeal filed.

Apr. 18—2nd Designation of Contents of Record on Appeal and Statement of Points filed.

SECOND DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

The defendant, John Landro, respectfully suggests and requests that in addition to the portions set forth in plaintiff-appellant's "Designation of Contents of Record on Appeal" the following part of the evidence submitted by defendant John Landro upon the hearing of this cause, be made a part of the record on appeal, to wit:

The letter of Doctor E. A. LeCocq, dated February 4, 1949.

/s/ HENRY RODEN,
Of Attorneys for Defendant
John Landro.

Copy received this 9th day of May, 1950.

/s/ R. E. ROBERTSON,
Attorney for Libby, McNeill
& Libby.

[Endorsed]: Filed May 9, 1950. [70]

LETTER OF DR. E. A. LeCOCQ

February 4, 1949

Mr. Roy E. Jackson, Attorney
American Building
Seattle 4, Washington

Re: Mr. John Landro, 2415 W. Boston, Seattle 99, Wash.

Dear Mr. Jackson:

This man was examined today, February 4th, at your request. He gave the following history: He was injured in Alaska while working for Libby, McNeill Company, on July 5, 1948. At that time, he was delivering fish and in jumping from his boat, he fell striking the lower back. He noticed immediate pain in the low back but tried to work the next two days. In order to do so it was necessary for him to crawl about to accomplish whatever he wished to do. Subsequently he developed bilateral sciatic radiation, worse on the left. This was noticed first in August of 1948. The intensity of the pain has remained about the same. He has noticed no definite improvement. On coughing or sneezing, he notices definite aggravation of the pain in the back with no apparent radiation. On occasions he has radiation of the pain into the hips. He has never noticed numbness or tingling in either leg or otherwise, he states he has been in good general health. In regard to work, he has not been able to work since the accident.

The past history is essentially negative, as is the family history. The previous operations have consisted of abdominal surgery in 1926 for a peptic ulcer, most probably a gastro-enterostomy, and in 1929, treatment of a compound fracture.

Examination revealed the pertinent findings to be limited to the low back. There was an increased dorsal rotundum involving the dorsal spine. The posture was definitely poor and the normal lumbar lordosis was definitely accentuated, a compensatory basis secondary to the above. In addition, there was considerable muscle spasm present in the low back. The chest expansion was $2\frac{1}{2}$ ". Flexion of the lumbar spine was definitely limited and guarded. Lateral bending and hyperextension was quite painful and limited also. Straight leg raising bilaterally was [71] not limited but on the extremes of this maneuver he noticed pain in the back of rather intense nature. The neurological examination throughout was essentially negative. Upon complete back flattening, the patient noticed complete relief of symptoms.

Radiographs which were made, consisting of A. P. and lateral views of the lumbosacral spine, revealed the following Findings: There was a definite accentuation of the normal lumbar lordosis with the sacrum approaching the very horizontal position. In addition, there was narrowing of the 5th intervertebral disc space posteriorly, and hypertrophic lipping was seen about the anterior margins about the vertebral bodies, predominantly the 4th lumbar.

Conclusions and recommendations: This patient's condition at the present time is due to an increased dorsal rotundum with secondary accentuated compensatory lumbar lordosis. This is actually on a postural basis but has been severely aggravated by his fall incurred on July 5, 1948. Therefore, it is felt that his condition is not fixed and that definite further treatment is in order at this time. The treatment should consist of application of an appropriate type of three-point pressure brace. The patient states that he now has a brace and we wish to inspect this brace to see whether it is adequate or not. If not, a Knight spinal brace will be necessary. In addition, he was instructed how to carry out postural position.

If his course is not satisfactory by conservative measures, then the only alternative would be consideration of a localized spinal fusion, limited to the lumbosacral joint.

Sincerely yours,

E. A. LeCOCQ,
M.D.

DEAL:EMP

P. S. The patient brought his brace in for inspection today, February 7th. This is to be refitted to give three-point pressure. We also wish to give him some postural work and would appreciate authorization for this.

E. A. L. [72]

In the District Court for the Territory of Alaska
Division Number Three at Anchorage.

No. 6139-A

LIBBY, McNEILL & LIBBY, a Corporation,
Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Insurance Commissioner, At-
torney General for Alaska, and the Territorial
Commissioner of Labor, and John Landro,
Defendants.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Plaintiff corporation, Libby, McNeill & Libby, appellant herein, hereby designates the hereinafter mentioned portions of the record, proceedings, and evidence, to be contained in the record on appeal and requests the Clerk of the above Court, to promptly prepare and under his hand and the seal of the Court to transmit to the United States Court of Appeals for the Ninth Circuit a true copy thereof in accordance with the rules of the appellate court, but to omit from all papers, except this Designation, the title of the court and the number and title of the cause, namely:

1. This Designation.
2. Complaint and Appeal from Decision and Award of Alaska Industrial Board under the Work-

men's Compensation Act of Alaska, together with the three exhibits thereto attached, namely:

I. Deposition of Dr. A. Bernard Gray.

II. Decision and Award of Alaska Industrial Board.

III. Letter of Dr. L. E. Williams of May 20, 1949.

3. Stipulation making Landro a party defendant.

4. Answer of defendant Landro.

5. Application for Adjustment of Claim.

6. Admission of Service and Answer to Application.

7. Appellant's Objections 4, 5, 6, and 7, of January 27, 1949.

8. Deposition of defendant Landro.

9. Deposition of Dr. O. J. Fortun.

10. Minute Order of January 18, 1950.

11. District Court's Opinion.

12. Judgment of March 24, 1950.

13. Notice of Appeal.

14. Supersedeas on Appeal.

15. Statement of Points upon which appellant intends to rely, and which are filed herewith.

16. All docket entries.

/s/ R. E. ROBERTSON,

Attorney for Plaintiff-
Appellant.

Copy received April 18, 1950.

/s/ HENRY RODEN,

Attorney for Defendant John
Landro.

/s/ J. GERALD WILLIAMS,
Attorney General for Alaska and Attorney for
Alaska Industrial Board.

Receipt of copy acknowledged.

[Endorsed]: Filed April 18, 1950.

CERTIFICATE

United States of America,
District of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 72 pages of typewritten matter, numbered from 1 to 72, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the Designation of Contents of Record on Appeal of Appellant on file herein and made a part hereof, in Cause # 6139-A, wherein Libby, McNeill & Libby, a corporation, is Plaintiff-Appellant and Alaska Industrial Board, et al. and John Landro are Defendants-Appellees, as the same appears of record and on file in my office; that said record is by virtue of an appeal in this cause.

And I further certify that by stipulation of the parties and with the consent of the Court the reporting of this case by the official Court Reporter was waived.

I further certify that the transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to Thirty-Six Dollars and 80/100 has been paid by Counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 23rd day of May, 1950.

J. W. LEIVERS,

Clerk of the District Court.

[Seal]: By /s/ D. E. McIVER,

Deputy.

[Endorsed]: No. 12561. United States Court of Appeals for the Ninth Circuit. Libby, McNeill & Libby, a Corporation, Appellant, vs. Alaska Industrial Board, Composed of the Territorial Insurance Commissioner, Attorney General for Alaska and the Territorial Commissioner of Labor and John Landro, Appellees. Transcript of Record. Appeal from the United States District Court for the Territory of Alaska, First Division.

Filed June 1, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.



No. 12,561

IN THE

United States Court of Appeals
For the Ninth Circuit

LIBBY, McNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of
the Territorial Insurance Commis-
sioner, Attorney General of Alaska and
the Territorial Commissioner of Labor,
and JOHN LANDRO,
Appellees.

BRIEF FOR APPELLANT.

R. E. ROBERTSON,

Seward Building, Juneau, Alaska,

ROBERT W. HOLLAND,

BOGLE, BOGLE & GATES,

Central Building, Seattle 4, Washington,

Attorneys for Appellant.

FILED

1911

PAUL C. JONES

Subject Index

	Page
Statement of pleadings and facts.....	1
A. Jurisdictional statutes	1
B. Pleadings	5
C. Facts	8
Questions presented	10
Argument	12
(A) Award must be based upon competent evidence	12
Question 1 (Points 1-5, R. 79-82).....	12
(B) Award should have been based on Dr. Gray's competent evidence.....	37
Attorney fee not taxable as costs against unsuccessful litigant on appeal to District Court for review of Alaska Industrial Board's award..	39
Question 2 (Point 6, R. 82).....	39
Conclusion	44

Table of Authorities Cited

Cases	Pages
Bethlehem Steel Co. v. Traylor, 148 Atl. 246, 73 A.L.R. 479	34
Carroll v. Knickerbocker Ice Co., 113 N.E. 507, reversed 155 N.Y. Supp. 1, L.R.A. 1916 A, page 268, note 9	33
Cashin v. N.Y.N.H. & H.R. Co., 70 N.E. 930.....	21
Davidson v. Cornell, 132 N.Y. 132.....	21
Employers, etc. v. Industrial A.C., 151 P. 423....	32
Forno v. Coyle, 75 F. (2d) 692, 5 A.F.R. 758....	39
Francisco v. Circle, etc. Co. (Ore.), 265 P. 801...	27
Godkin v. Brooklyn, etc. Corp., 269 N.Y. Suppl. 809	27
Hickenbottom v. D. L. & W. R. R. Co., 25 N.E. (N.Y.) 279	17
Lallier Construction Co. v. Industrial Commission, 17 P. (2d) (Col.) 534.....	30
Libby, McNeill & Libby v. Board, 11 A.R. 327...	36
Lindquist v. Tiedelson, 248 N.Y. Suppl. 775....	27
Mutual, etc., Ass'n v. Moyer, 94 F. (2d) 906, 9 Alaska Reports 235, cer. den. 304 U.S. 581.....	40
Pfau v. Alteria, 52 N.Y.S. 88.....	17
Phillips v. Industrial Commission, 61 N.E. (2d) (Ill.) 681, 172 A.L.R. 372.....	36
Pierson v. Ill. C. R. Co., 123 N.W. (Mich.) 576...	16
Pond v. Goldstein, 41 F. (2d) 76, 5 A.F.R. 544...	39
Reck v. Whittlesberger, 148 N.W. (Mich.) 247...	32, 34
Roche v. Brooklyn C. & N. R. Co., 105 N.Y. 294...	21

	Pages
Shaughnessy v. Holt, 86 N.E. (111.) 256, annotated in 21 L.R.A. (N.S.) 826.....	22
Shawnee-Tecumseh Traction Co. v. Grigg (Okla.), 151 P. 230	16
Sickmund v. Conn. Co. (Conn.), 189 Atl. 876....	16
Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. 606, 6 A.L.R. 543.....	22, 32, 36
Stevens v. Rodgers, 25 Hun. (N.Y.) 54.....	17
Sund v. Chicago R. I. & P. Co., 204 N.W. 628....	21
United Benefit Life Ins. Co. v. Elliott, et al., 11 Alaska Reports 466	43
West Chicago S.R. Co. v. Kennelly, 48 N.E. 996..	21

Statutes

A.C.L.A. 1949:

Section 55-11-55	39, 40, 42, 43
Chapter 4, Title 56, Section 55-11-52, 2nd subparagraph	43
Section 55-11-52, formerly Section 4062, C.L. A. 1933	43
Volume 2, Section 43-3-14	27, 28, 29
Volume 2, Section 43-3-15	2, 27
Volume 2, Section 43-3-16	3, 29
Volume 2, Section 43-3-22.....	4, 35
Volume 2, Section 43-3-25	4
Volume 3, Section 55-11-55	11
Volume 3, Sections 56-2-1 to 56-2-4, Code of Civil Procedure, formerly Chapter CII, Sections 3816 to 3819, A.C.L. 1933.....	43
Volume 3, Sections 56-4-1 to 56-4-14, Code of Civil Procedure, formerly Chapter CIII, Sections 3824 to 3837, A.C.L. 1933.....	44

	Pages
A.S.L. 1923, Chapter 38, Section 1.....	39
A.S.L. 1937, Chapter 58	43
A.S.L. 1947, Chapter 84	39, 43
Federal Judicial Code, Section 1291.....	4
U.S.C.A., Title 28, Judiciary and Judicial Procedure, Section 1291	5
Workmen's Compensation Act of Alaska:	
Section 10	40
Section 17	41
Section 23	41, 43

Texts

Abbott on Facts (Vesselman's 5th Ed.):	
Section 256 (d), page 375	18
Section 857, page 1227	17
58 Am. Jur. 863, Section 445.....	30
58 Am. Jur. 882, Section 483.....	34
Annotation on Workmen's Compensation L.R.A. 1916 (a), page 267	32
Horovitz Injury and Death under Workmen's Compensation Laws (1944), page 242.....	29
Schwartz Trial of Automobile Cases, Second Edition:	
Page 429	16
Page 430	16, 27
Page 438	21
Page 453	17

No. 12,561

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LIBBY, McNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of
the Territorial Insurance Commis-
sioner, Attorney General of Alaska and
the Territorial Commissioner of Labor,
and JOHN LANDRO,
Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF PLEADINGS AND FACTS.

A. JURISDICTIONAL STATUTES.

The Workmen's Compensation Act of Alaska (full text, Appendix A) provides:

“Section 15. PROCEDURE IN DISPUTED CLAIMS.
If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or, if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6, and afterwards disagree

as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred, unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties."

Section 43-3-15, ACLA 1949, Volume 2.

The act further provides:

"Section 16. REVIEW BY FULL BOARD. If an application for review is made to the Industrial Board within ten days from the date of an award,

made by less than all the members, the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith."

Section 43-3-16, ACLA 1949, Volume 2.

The act further provides:

"Section 22. COURT REVIEW: QUESTION OF LAW. An award of the Board, by less than all of the members, as provided in Section 15, if not reviewed as provided in Section 16, shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if the award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the District in which the injury occurred. The orders, writs and processes of the court in such proceeding may run, be served, and be returnable in accordance with the rules of said court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such proceeding unless, upon application for an inter-

locutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage. * * *

Section 43-3-22, ACLA 1949, Volume 2.

The act further provides:

“Section 25. JURISDICTION OF COURT. No court of this Territory, except the United States District Court on review, or the United States Circuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties.”

Section 43-3-25, ACLA 1949, Volume 2.

Section 1291 of the new Federal Judicial Code provides:

“Section 1291. Final Decisions of District Courts. The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin

Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

Title 28, USCA Judiciary and Judicial Procedure, Section 1291.

B. PLEADINGS.

"Application for Adjustment of Claim" filed with Board by appellee Landro, dated March 24, 1949 (R. 38-40).

"Admission of Service and Answer to Application" filed with Board by appellant, dated May 26, 1949 (R. 40-42), in which appellant gave notice "The defendant will insist that all evidence must be adduced according to legal rules for the admission of evidence and it is otherwise inadmissible, and will object to all *ex parte* evidence offered to prove or seek to prove any of the facts upon which the claimant bases his claim; and the defendant will insist upon having a hearing before the full membership of the board." (R. 41-42).

Written objections (R. 43) were also served and filed with the Board before the hearing by Appellant, namely:

"4. That it contends that evidence must be adduced in a legal manner, and not *ex parte*, and is entitled to the right of cross-examination of all of claimant's witnesses."

"5. That it demands a hearing before the full board with all members of the board present."

“6. That the law does not authorize or permit a hearing to be held upon the extent of alleged temporary disability and a later hearing upon partial permanent disability.”

“7. That claimant has, if any, only one claim.”

Appellee Landro gave his testimony by deposition (R. 44-56) on May 26, 1949, See Appendix B for proof of date. Subsequently a hearing was held before the full Board (R. 32) on June 27, 1949. Proof of date see Appendix B.

At the hearing appellee Landro's deposition (R. 44-56) was received in evidence, in addition to which the Board, over appellant's objections (R. 41-42; and 43), considered and treated as evidence the unverified letters to appellee Landro's attorney of Dr. L. E. Williams of May 20, 1949 (R. 36), and possibly also of Dr. E. A. LeCocq of February 4, 1949 (R. 85-87).

At the hearing the appellant put in evidence the deposition of Dr. O. J. Fortun (R. 57-69) and of Dr. A. Bernard Gray (R. 11-30).

The full Board on June 28, 1949, made its decision and award (R. 32-35) in which it found that appellee Landro sustained temporary total disability from July 6, 1948, to May 20, 1949, but that appellant had paid him compensation therefor only through September 30, 1948, (R. 33) and that he was entitled to further temporary total disability compensation of \$2577.96 for the period from October 1, 1948, to May

20, 1949, but made no finding as to any permanent disability (R. 34).

Appellant appealed from the Board decision to the District Court of the Third Judicial Division of Alaska, within which division the injury occurred, which Third Judicial Division transferred the proceedings to the First Judicial Division for trial. Complaint and Appeal (R. 2-8). For transfer, see R. 83.

All parties stipulated that appellee Landro might be made a party defendant in the cause before the District Court (R. 37).

Appellee Landro filed his answer (R. 37) in which he denied the allegations of paragraph IX (R. 5-6) but otherwise did not deny any of the allegations of the "Complaint and Appeal" (R. 2-8), so the District Court tried the appeal as though appellee Landro had demurred to appellant's Complaint and Appeal.

The Alaska Industrial Board did not move or otherwise plead to appellant's Complaint and Appeal.

After a hearing (R. 71) before the District Court, it rendered its written opinion (R. 72-74) on February 23, 1950, in which it sustained the Board's decision and award.

The District Court on March 24, 1950, entered its judgment allowing appellee Landro temporary total disability compensation of \$2,577.96 (which with interest totalled \$2,805.00) for the period from October 1, 1948, to May 20, 1949, and also for costs and disbursements, including an attorney fee of \$200.00 (R.

74-75), and therein decreed the finality of said judgment as to such temporary total disability compensation (R. 74).

Appellant gave notice of appeal on March 28, 1950, and filed on April 3, 1950 (R. 76).

Appellant made and filed its supersedeas on appeal which was approved as to form, amount, and sufficiency of surety by appellee Landro and was approved and the appeal allowed on April 3, 1950, by the judge of the District Court (R. 76-79).

Appellant served and filed its Statement of Points on April 18, 1950 (R. 79-82).

Appellant served and filed its designation of contents of the record on appeal on April 18, 1950, (R. 88-89).

Appellee Landro by designation (R. 84) included in the record the unverified, ex parte letter of Dr. Le Cocq of February 4, 1949 (R. 85-87).

C. FACTS.

Appellee Landro, while employed by Libby, McNeill & Libby, as a fisherman at its Ekuk salmon cannery, Bristol Bay, which is in the Third Judicial Division of Alaska, on July 5, 1948, sustained an injury arising out of and in the course of his employment when he slipped in jumping from a scow to a boat in rough weather (R. 38-39; also 44-45).

Appellant at that time was engaged in the operation of a salmon cannery at Ekuk, Alaska, and had in its employ three or more employees (R. 2-3).

Appellee Landro's evidence consisted of his own testimony (R. 45-56), and of Dr. L. E. Williams' letter of May 20, 1949, to attorney Roy E. Jackson (R. 36) and of Dr. E. A. Le Cocq's letter of February 4, 1949, to attorney Jackson (R. 85-87).

Appellant's evidence consisted of Dr. O. J. Fortun's deposition (R. 57-69), and Dr. A. Bernard Gray's deposition (R. 11-30).

The Board rendered its decision and award on June 28, 1949 (R. 35), but notice thereof was not given to appellant until July 8, 1949 (R. 5). The Complaint and Appeal was filed with the Clerk of the District Court of the Third Judicial Division on July 28, 1949 (See Appendix B), and was filed upon transfer thereto by the Clerk of the District Court of the First Judicial Division on August 6, 1949 (R. 83).

Final judgment was entered by the District Court of the First Judicial Division on March 24, 1950, awarding the appellee Landro temporary disability compensation of \$2,577.96, which with interest then amounted to \$2,805.00 (R. 74-75), the appellant having paid Landro \$680.76 prior to the filing of his claim (R. 39).

QUESTIONS PRESENTED.

Appellant's "Statement of Points" (R. 79-82) makes six points upon which appellant relies, but which appellant believes can be presented by two questions inasmuch as appellant, upon further consideration thereof, doubts it can herein raise that inferentially involved by the Board's reservation until some indefinite future date whether or not appellee Landro suffered any permanent, either partial or total, disability because seemingly that question should be raised when and if the Board makes such a determination.

Neither of these two questions, so far as appellant is informed, has ever been presented either to this or to the lower court, except in what might be termed the companion case No. 12562 of this Court.

The first of these questions was presented at the hearing before the Board by appellant's "Admission of Service and Answer to Application" and also by its written Objections filed with the Board (R. 43) and in the District Court by Appellant's "Complaint and Appeal," particularly by Paragraph IX thereof (R. 5-6), the allegations of which Paragraph IX were put in issue by appellee Landro's Answer (R. 37).

First—Appellant contends that the Workmen's Compensation Act of Alaska (Full text, Appendix A) does not authorize the Board to base its Findings, Decision and Award upon Ex parte, hearsay, unverified, or other incompetent evidence.

This rule is supported by many decisions, hereinafter cited, and, inasmuch as the Board's Findings, Decision and Award were based solely upon ex parte, hearsay, unverified, or other incompetent evidence, those Findings were not conclusive upon the District Court; hence, it should have based its Judgment upon the only competent evidence that was adduced at the hearing before the Board and modified the Board's Findings to adjudge that appellee Landro's temporary total disability ended October 1, 1948, and that he sustained no permanent disability as a result of the accidental injury upon which he based his claim.

Second—Appellant contends that the District Court for the Territory of Alaska has no jurisdiction to allow, in a review before it on appeal of the Alaska Industrial Board's Finding, Decision and Award, an attorney fee to the successful litigant in that appeal; hence, that the District Court erred in its Judgment (R. 75) in adjudging that appellant should pay appellee Landro an attorney fee of \$200.00.

Appellant submits the Workmen's Compensation Act of Alaska (Full text—Appendix A) is a special procedural Act and that the only compensation payable to an injured employee is that specified by the Act; hence, that allowance of costs with "a reasonable attorney's fee to be fixed by the Court," under Section 55-11-55, ACLA 1949, Volume 3, is inapplicable; and that the amount of an attorney's fee of \$200.00 would constitute additional compensation which is not authorized by the Act.

This question was raised by oral exception to the Judgment and by serving and filing appellant's Statement of Points (Point 6, R. 82).

ARGUMENT.

(A) AWARD MUST BE BASED UPON COMPETENT EVIDENCE.

Question 1 (Points 1-5, R. 79-82).

As early as May 26, 1949, both the Board and the appellee Landro were informed by appellant by demand therefor made by the latter in its Answer (R. 40-42) that appellant would insist that all evidence be adduced according to legal rules for the admission of evidence or that it would otherwise be inadmissible and object to all ex parte evidence offered to prove or seek to prove any of the facts upon which the appellee Landro based his claim.

Furthermore, at the hearing appellant served and filed its written objections to the same effect, and also that the Board was not authorized to hold a hearing upon the extent of alleged temporary disability and a later hearing upon the question of partial permanent disability, and that the appellee Landro had, if any, only one claim (R. 43).

The Board's Findings that appellee Landro had been totally temporarily disabled from July 5, 1948, to May 20, 1949, that is the period thereof from October 1, 1948, to May 20, 1949, and was entitled to temporary disability compensation of \$2,577.96 for

the period from October 1, 1948, to May 20, 1949 (R. 34), affirmed by Judgment (R. 75), is not based upon any legal or competent evidence.

To the contrary it was based solely upon either ex parte or hearsay evidence.

Appellee Landro's only evidence was his personal testimony (R. 44-56) and an unverified ex parte letter to Landro's attorney of Dr. Williams of May 20, 1949 (R. 36), and possibly the Board also considered Dr. Le Cocq's unverified ex parte letter to Landro's attorney of February 4, 1949 (R. 85).

Landro gave his oral testimony by deposition (R. 44-56) before the Board. While he first claimed he had never previously suffered from any disease, or had an accident or laid off from work because of sickness (R. 51), later he admitted he had an operation for a peptic ulcer and also had been treated for a compound fracture (R. 56).

His testimony in nowise shows termination of total temporary disability on May 20, 1949, although intimates it had ended at some indefinite previous date by his statement that his condition "is up and down. It is not good at all. It is such that I could not do any hard work of pulling. There are days that I might be able to do light work but other days I couldn't begin to do any work at all." (R. 49).

His testimony if not directly at least impliedly is that in the accident he hurt his back (R. 45-46). If we understand Dr. Le Cocq's letter of February 4,

1949 (R. 85-87), correctly, Landro told the doctor that he, Landro, had had something wrong with his back prior to the accident, because Le Cocq said that Landro on February 4, 1949, had an increased dorsal rotundum with secondary accentuated compensatory lumbar lordosis, which "is actually on a postural basis but has been severely aggravated by his fall on July 5, 1948" (R. 87).

Without conceding the credibility of or any probative weight to the testimony of Landro, we assume, for the purposes of the argument, that a person claiming an injury, even though a layman, may properly testify that he is still partially or totally disabled from performing his work; also that a lay witness may properly testify from personal knowledge to the manner in which a person, who claims to have been injured, does his work after the receipt of the claimed injury.

But, Landro was a layman, and while doubtless he could properly testify, for instance, that his right forearm was swollen or black and blue on a particular day or days, or to any other objective injury, and Landro himself could testify that he suffered pain, weakness, or physical impairment, and a lay witness, who witnessed it, could testify that Landro by his conduct or expression evinced pain or suffering, yet, being laymen, the testimony of neither is admissible to prove subjective injuries, such as are claimed here, the character, extent and future effect of which can be only known to experts in human anatomy, or that

Landro's physical condition at the time he testified was caused by his claimed injury; hence, no inference can be properly based upon such if any testimony as he did give, that any subjective symptoms of which Landro claimed to be suffering at the time of giving his testimony, were due to his accident.

Landro in his "Application for Adjustment of Claim" claims in question 1, "back became very painful, had to stop work, and has resulted in severe injury to lower lumbar back, producing a stiff, painful back, and inability to work." (R. 39).

Nor does he claim any objective injury nor is there any evidence of any objective injury such as a black eye, broken arm, mashed finger.

The first sentence of Dr. Williams' letter of May 20, 1949 (R. 36), did also indicate that Landro told the doctor of nothing other than relative to an injury to his lower back.

The letter of Dr. Le Cocq of February 4, 1949 (R. 85), also indicates that Landro confined his complaint to his lower back.

His claim is actually premised (R. 39) upon his having suffered subjective or internal injuries, none of which disclosed their presence upon the surface of his body where they would be the object of a witness' eyes.

Only an expert in human anatomy is qualified to testify as to the character, extent and future effect,

if any, of the internal injuries he claims to have suffered.

“Where, however, the injuries or pain are subjective and of such a character that laymen cannot know with reasonable certainty the cause, extent, or their future effect, then there must be offered evidence by expert witnesses, learned in human anatomy, who can testify from a personal examination or from knowledge of the history of the case or from a hypothetical question based on the facts as to the matter involved in the suit.”

Schwartz Trial of Automobile Cases, Second Edition, Pages 429, 430;

Sickmund v. Conn. Co. (Conn.) 189 At. 876;

Shawnee-Tecumseh Traction Co. v. Grigg, (Okla.) 151 P. 230.

If this were not the rule there would be no sense in calling a medical expert or qualifying him as such for his testimony.

The distinction is perhaps no better shown than that a layman can testify as to another's evincing pain, but he is not qualified to testify whether that expression of pain is feigned or real. A medical expert must be called to testify to that. The layman can only testify to the facts as he observes them.

Pierson v. Ill. C. R. Co., 123 N.W. (Mich.) 576.

Landro, being a layman, was not qualified to testify that any subjective symptom of ailment suffered by him was caused by such, if any, injury as he accidentally sustained on July 5, 1948.

The point is that a layman has no such knowledge of human anatomy as to be able to do anything but guess as to the cause of a subjective symptom.

Thus, remote and unusual effects of physical injuries such as cancer or tuberculosis would call for more than a layman's knowledge of cause and effect.

Hickenbottom v. D.L. & W. R. R. Co., 25 NE (NY) 279;

Schwartz Trial of Automobile Cases, Second Edition, Page 453.

Having in nowise qualified himself as an expert in human anatomy, Landro's testimony, either direct or implied, that his present condition is the effect of his injury is nothing more than surmise, and his opinion is incompetent.

"A person injured may testify to the effects of an injury or operation upon him, and what is the resulting condition, provided that, unless he is an expert his answer states only facts of knowledge and consciousness, and not opinions, requiring professional skill to form justly."

Abbott on Facts (Vesselman's 5th Ed.) P. 1227, Sec. 857.

Abbott on Facts cites the following cases in support of his thesis, i.e.:

One, not an expert, cannot testify that the effect of a blow on his ear was to produce deafness.

Stevens v. Rodger, 25 Hun. (N.Y.) 54, and

One not an expert, cannot testify that his head will never be the same as it was.

Pfau v. Alteria, 52 N.Y.S. 88.

Abbott on Facts further states:

“The opinions of medical experts as to the causes of death, injury, or other particular physical condition are admissible as evidence upon the ground that such witnesses have *peculiar knowledge or skill* with reference to the particular subject matter in question. Such opinions are therefore admissible where they are *inferences of skill* derived either from observation or from *scientific deductions* from given facts. So, *an expert* who has examined an injured person or the body of one deceased may state *his opinion* as to what was the cause of the wound or other injury thereon or the cause of death.” (Emphasis supplied).

Abbott on Facts (Vesselman’s 5th Ed.) P. 375, Section 256 (d).

The testimony of Landro was thus incompetent because of his incompetency to testify as to the extent, duration and cause of his physical condition. Thus reducing Landro’s evidence to the unverified ex parte letter of Dr. Williams of May 20, 1949, (R. 36) and of Dr. Le Cocq of February 4, 1949 (R. 85-87).

Dr. Williams’ unverified letter of May 20, 1949 (R. 36), clearly intimates that the examination was not made by a physician of a patient to prescribe remedies for the patient’s illness, but solely to bolster up appellee Landro’s claim for compensation.

It says that Landro’s “complaints are the same as previously”—seemingly as on March 19th—“and the objective physical findings are the same.”

It also plainly indicates that at some prior unmentioned date—possibly March 19th—Landro's condition then was the same as on May 20, 1949, because the Doctor said: "I would still estimate his disability as 40% of the maximum of unspecified permanent partial disabilities."

Therefore, this letter admits that Landro's temporary total disability, instead of having continued to May 20, 1949, as found by the Board (R. 34), affirmed by judgment (R. 75), had ended on some previous indefinite date, perhaps March 19th, or at least two months prior to the date to which both the Board and the District Court say appellant must pay total temporary disability compensation to appellee Landro.

Dr. LeCocq's examination of Landro on February 4, 1949, was patently not made as for the purpose of a physician to prescribe to an ailing patient; but, at the request of Landro's attorney to bolster up Landro's claim (R. 85).

All of the statements in the first paragraph (R. 85) are hearsay based upon what Landro told LeCocq.

The doctor ventures no statement whatsoever as to Landro's temporary or permanent disability, other than to state "It is felt that his condition is not fixed and that definite further treatment is in order at this time." (R. 87).

The letter contains not a word to the effect that Landro's total temporary disability would or should

end May 20, 1949, or that Landro had not already recovered his full wage earning capacity, other than the plain hearsay statement made to him by Landro, "In regard to work, he has not been able to work since the accident." (R. 85).

If LeCocq's letter is competent evidence of any fact, which appellant does not concede, it is proof that Landro had not suffered an original injury on July 5, 1948, but at most only aggravated some previous condition of his back, because, as already noted, in that letter Dr. LeCocq said that Landro had an increased dorsal rotundum, with secondary accentuated compensatory lumbar lordosis, which "is actually on a postural basis but has been severely aggravated by his fall incurred on July 5, 1948." (R. 87).

Repetition of statements made by Landro to Drs. Williams and LeCocq, because they were doctors are no more admissible than though they were laymen, and are inadmissible under the hearsay rule that such statements are not admissible unless brought within some exception, such as being part of the *res gestae*, of the hearsay rule. These particular statements disclose that they do not come within any exception to that rule.

Landro's statements to those doctors on the occasions reported upon by them in their letters were not involuntary exclamations of pain by Landro. Neither were they declarations made to those physicians so that the latter could prescribe curative remedies to him.

His statements made to them and used by them in writing those letters we submit are within the rule, namely:

“A clear distinction is drawn, however, between involuntary exclamations of pain and evidence of simple declarations by the plaintiff made some time after the injury that he was then suffering pain. Such evidence is of a totally different nature, the likelihood of gross exaggeration being so much greater. Evidence of complaints of pain is therefore inadmissible unless made to a physician for the purpose of receiving treatment.”

Schwartz Trial of Automobile Accident Cases,
(2nd Edition), Page 438,

citing:

Roche v. Brooklyn C. & N. R. Co., 105 N.Y. 294;

West Chicago S.R. Co. v. Kennelly, 48 N.E. 996;

Cashin v. N.Y.N.H. & H.R. Co., 70 N.E. 930;

Sund v. Chicago R. I. & P. Co., 204 N.W. 628;

Davidson v. Cornell, 132 N.Y. 132, 228, 237.

This rule is also expressed:

“Declarations made by one injured to his attending physician are admissible when they relate to the part of his body injured, his suffering symptoms and the like; but, *not if they relate to the cause of the injury*. This rule is more rigorously applied to lay witnesses. Chicago & A.R.

Co. v. Industrial Board, 113 N.E. 629." (Emphasis supplied).

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. 606, 6 ALR 543.

Also:

Shaughnessy v. Holt, 86 N.E. (Ill.) 256, annotated in 21 LRA (NS) 826.

However, Dr. Williams' letter of May 20, 1949 (R. 36), is the only basis of the Board's finding that Landro's total temporary disability continued until May 20, 1949 (Award, R. 34).

This conclusion of appellant seemingly is justified by the fact that the examination of Dr. Williams is the only one mentioned in the Board's award (R. 33). Moreover, Dr. LeCocq in his letter of February 4, 1949 (R. 85-87), made no prediction whatever as to when and if Landro's condition on February 4, 1949, would change or become fixed; in fact, he could not possibly have guessed that it would become fixed on May 20, 1949, some three and one-half months in the future.

Dr. Fortun testified in no manner as to when whatever Landro's condition was when he examined him would end or change, nor could he possibly have predicted that Landro would suffer total temporary disability until May 20, 1949, nine months in the future.

Dr. Gray testified in his opinion that Landro's total temporary disability ended on October 1, 1948 (R. 17, R. 22).

It thus clearly appears that solely upon the testimony of appellee Landro and the letter of Dr. Williams of May 20, 1949 (R. 36), and of Dr. LeCocq of February 4, 1949 (R. 85-87), the Board based its decision and award (R. 32-35) awarding Landro total temporary disability of \$2577.96 for the period from October 1, 1948 to May 20, 1949 (R. 34), appellant having previously paid Landro total temporary disability compensation of \$680.76 for the period from August 1, 1948, to September 30, 1948 (R. 39), and, despite his disablement on July 5, 1948, the season run money and wages of \$1972.00 for the season's two months' work (R. 52), Landro having started to fish on June 28, 1948 (R. 45).

Logically, if Dr. Williams' letter of May 20, 1949 (R. 36) is credible and competent evidence of Landro's total temporary disability having ended on May 20, 1949, then it also is equally credible and competent evidence of Landro's having sustained 40% permanent disability, because he estimated Landro's then disability "as 40% of the maximum for unspecified partial disabilities" (R. 36).

But, the Board ignored that statement and held that it was unable to find what, if any, permanent total disability Landro had sustained (R. 34), which finding was at least impliedly affirmed by the Court's opinion (R. 72-74) and Judgment (R. 74-75).

As a matter of fact, the court in its opinion said, "it may be conceded that the evidence preponderates in" appellant's favor, on the appellant's contention

that the Board's findings as to total temporary disability were not supported by substantial evidence (R. 73), which point was raised by sub-paragraphs 4, 5, and 6, paragraph IX (R. 5-6) of its "Complaint and Appeal."

Appellant adduced the testimony by deposition of Dr. O. J. Fortun (R. 58-69). Dr. Fortun had been in the general practice of medicine for about 30 years (R. 58-59).

He was the first physician to examine Landro and found that the latter suffered what is "sometimes called lumbago from exposure to rain and cold winds," which examination was made on July 15, 1948 (R. 60).

He treated Landro with salicylates and physiotherapy, which was mostly infra-red light and massage, "things you give for sore back," but he found no external evidence on the skin of any injury whatsoever, although he made an examination for that purpose (R. 61).

He admitted that he was not a specialist in treating spinal injuries (R. 65) and that having no x-ray machine he did not take an x-ray picture of Landro's back (R. 64), but maintained under a rigid cross-examination that Landro was suffering from lumbago (R. 68).

He said nothing about termination of either temporary total disability or permanent, either partial or total disability.

Appellant also adduced the testimony by deposition of Dr. A. Bernard Gray, who specializes in orthopedic and traumatic surgery and who has had a rather varied, extensive experience (R. 11-12). He first examined Landro on July 23, 1948 (R. 12), who told him that he had no previous back trouble, which statement was directly contrary to what Landro must have told Dr. LeCocq as claimed by the latter in his letter of February 4, 1949 (R. 87).

Dr. Gray said that Landro, at the time of the examination on July 23, 1948, was up and around and was living in a hotel in Seattle (R. 13). Dr. Gray's rather extensive examination, including the taking of x-rays of both views of the lower spine and stereoscopic x-rays, revealed no evidence of any injury of the fourth lumbar vertebra or of injury about the body thereof (R. 16).

Dr. Gray hospitalized and treated Landro by bed rest, physiotherapy and applications of lumbar sacral brace over a period of time until October 15, 1948, but he made his last examination of Landro on October 29, 1948, which indicated that Landro's condition had been stationary for at least four weeks, and he was of the opinion that Landro was fit to go to work (R. 17).

His diagnosis of Landro was an acute contusion and strain of the lower spine which occurred July 5, 1948, and which resulted in symptoms which gradually subsided and of Landro's upper spine as due to infectious myositis or rheumatism of the muscles

of the dorsal spine but that the myositis had no relation to Landro's accident (R. 19).

Dr. Gray stated that in his opinion Landro's subjective symptoms represented a disability of 10% and he recommended that, if his claim was in order, it would be closed on such an award (R. 18) and that no evidence existed of any disability of the lower spine on clinical examination but Landro did complain of the lower spine tiring more easily; hence, there being no objective evidence of disability he placed his award on the basis of Landro's subjective symptoms (R. 19).

On cross-examination Dr. Gray also stated that a so-called degenerative arthritis of the spine was indicated to some extent in the region of Landro's fourth and fifth lumbar, but he found no evidence of a narrowing of the fifth intervertebral disk space posteriorly (R. 20-21); also that he felt that Landro's temporary disability had terminated on October 1, 1948 (R. 22).

Dr. Gray again saw Landro in March, 1949 (R. 23), but he did not treat Landro at that time. The doctor said "I saw him, and he was having trouble, and I wanted to see that he got some care, but he came in to see me because he wanted my opinion, and I told him that I didn't think that this related to the condition for which I had treated him, and I gave him the best advice that I could." (R. 26).

The general rule is,

“Where medical proof is required, it must be furnished either by producing the doctor for examination and cross examination or by his deposition taken pursuant to law. The Doctor’s unverified report or declaration not made in Court, will be insufficient.”

Schwartz Trial of Automobile Cases, Second Edition, Page 430,

citing:

Lindquist v. Triedelson, 248 N.Y. Suppl. 775;
Francisco v. Circle, etc. Co. (Ore.) 265 P. 801;
Godkin v. Brooklyn, etc. Corp., 269 N.Y. Suppl. 809.

This rule is not obviated because this hearing is under the Alaska Workmen’s Compensation Act which provides:

“ . . . Process and procedure under this Act shall be as summary and simple as reasonably may be . . . ”

Section 43-3-14, ACLA 1949, Volume 2.

“ . . . The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. . . . ”

Section 43-3-15, ACLA 1949, Volume 2.

The Act nowhere sanctions the use of incompetent or hearsay evidence upon which to base the Board’s findings.

To the contrary, the Act empowers the Board to administer oaths.

“ . . . The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute . . .

“The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records.”

Section 43-3-14, ACLA 1949, Volume 2.

What sense or consistency could there be to administer an oath to either an employer or an employee if he personally appeared to testify before the Board, and on the other hand to consider as evidence an unverified, ex parte letter written by either an employer, an employee, or even a physician, which he mailed or handed to the Board?

The use of such unverified, ex parte letters by either employer or employee can only lead to fraud, deceit and lies, without opportunity to the other to expose such fraud, deceit and lies by cross-examination.

The Act also provides:

“When an application for review is made, the full Board, if the first hearing was not held be-

fore the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable . . .”

Section 43-3-16, ACLA 1949, Volume 2.

These and other provisions of the Act plainly indicate its intent that the hearing shall not be a Star Chamber proceedings, but shall be held, though summarily, in an orderly, legal, quasi-judicial manner.

The language of the Act, namely:

“Process and procedure under this Act shall be as summary and simple as reasonably may be.”

Section 43-3-14, ACLA 1949, Volume 2,

is not peculiar to Alaska. It is found in workmen's compensation statutes of various other jurisdictions. That language has been stated by an authoritative work on Workmen's Compensation Laws to bar hearsay.

“Other state legislatures did not abolish all common rules” (for workmen's compensation hearings). “They provided that ‘Process and procedure should be as simple and summary as reasonably may be.’ Procedure was simplified. Simple forms were used. The mail replaced the sheriff. Hearsay was taboo and should not even be admitted in evidence.”

Horovitz Injury and Death under Workmen's Compensation Laws (1944), Page 242.

Even in jurisdictions where the administrative tribunal of such statutes may dispense with the tech-

nical rules of evidence, an evidentiary rule of substance is often retained.

“It is manifest, however, that the rule against hearsay is not technical but vitally substantial and may not properly be disregarded under such statutory provisions without grave danger of collusion, imposition, and injustice. If a claimant be permitted to make out a case upon the essential facts of accidental injury upon hearsay testimony alone, there is no limit to the frauds and wrongs that may be encouraged and made possible.”

Lallier Construction Co. v. Industrial Commission, 17P2 (Col.) 534.

American Jurisprudence says:

“It may be stated as a general rule that, in the absence of any statutory sanction therefor, hearsay evidence is not admissible in a proceeding before a compensation board or commission, unless it falls within one of the established exceptions to the rule of exclusion.”

58 *Am. Jur.* 863, Sec. 445,

citing an Illinois decision which held not only that hearsay was inadmissible but also that evidence was inadmissible where the adverse party had been denied the right of *cross-examination*, viz.:

“The sole question raised in this case is whether or not there is any competent evidence in the record showing that the death of Cloyes was caused by an injury which arose out of and in the course of his employment. The oral testi-

mony bearing upon that question, heard before the arbitrator, and the Industrial Commission over the plaintiff in error's objection, was hearsay and incompetent. That testimony consisted of statements of the witnesses of what the deceased told them about when, where, and how he received the injury, and what he was doing at that time. No one testified who had any knowledge of those facts, except from the statements made to them by the deceased. Declarations made by one injured to his attending physician are admissible when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if they relate to the cause of the injury. This rule is more rigorously enforced when applied to lay witnesses. *Chicago & A. R. Co. v. Industrial Board*, 274 Ill. 336, 113 NE 629.

* * * * *

“It is a well-known and well-recognized rule that the evidence of a witness or witnesses, dead or alive, in any suit, although prosecuted to final judgment, is not admissible against any third party in another suit who was not a party to such judgment. The main ground upon which this rule is based is that such third party had no right of cross-examination of such witness or witnesses. The evidence of witnesses before the coroner's jury, dead or living, is not admissible against either party in a civil suit for damages, and for the same reason as above given. *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N.E. 439; *Knights Templars' & M. Life Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N.E. 1066. If the evidence of the witnesses before the coroner's jury is not receivable against a party

in the civil suit growing out of the death of the party over whose body the inquest is held, and the judgment and findings of a court in another suit concerning the same death are not admissible, there is no sound reason, in our judgment, why the inquest of a coroner ought to be admissible to prove, *prima facie* or otherwise, any issue in such case."

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. (Ill.) 606; 6 ALR at pages 543, 546, 547,

also citing:

Reck v. Whittlesberger, 148 N.W. (Mich.) 247.

The California Court also held:

"An award based merely on hearsay evidence cannot be sustained."

Employers, etc. v. Industrial A.C., 151 P. 423.

The *Annotation on Workmen's Compensation LRA* 1916 (A), page 267, states:

"Nor, according to the weight of authority, can it" (the Board) "base an award on hearsay evidence only,"

citing the foregoing cases of:

Reck v. Whittlesberger, 148 N.W. 247;

Employers, etc. v. Industrial A.C., 151 P. 423.

The language of the New York Act providing that the Commission shall not be bound by common-law or statutory rules of evidence, or by technical rules of procedure, and may make its investigation in such a way as to ascertain the substantial rights of the

parties—which language is much broader than that of the Alaskan Act—has been held not to mean that the Commission may base an award upon hearsay evidence alone. While the New York Act allows the admission of hearsay evidence, there must be legal evidence in support of an award.

Carroll v. Knickerbocker Ice Co., 113 N.E. 507, which reversed the previous decision in that case in 155 N.Y. Supp. 1, L.R.A. 1916A, at page 268, note 9.

It will be noted that the Board's Award herein has no legal evidence whatever to support its Findings.

The Maryland statute, similar to that of New York, was construed similarly to the New York Act.

“The first three exceptions were against the admission of the testimony of Mrs. Traylor and Mrs. Carey as to Traylor's statements when he was sick on his return from work, on occasions prior to the last that he had been gassed at the plant. In *Standard Oil Co. v. Mealey*, 147 Md. 252, 127 Atl. 851, it is said in the opinion delivered by Chief Judge Bond: ‘Divergent views have been entertained in other jurisdictions on the relaxation by a Court of its ordinary rule for excluding hearsay evidence on review of compensation cases. . . . In New York, where the statutory provisions for the relaxation of rules of evidence before the Commission is the same as that in the Maryland Act, hearsay testimony is received in court reviews, but an award is not permitted to be based on such testimony alone. *Carroll v. Knickerbocker Ice Co.* 218 N.Y. 435, 113 N.E. 507, Ann. Cas. 1918B, 540; *Belcher v.*

Carthage Mach. Co. 224 N.Y. 326, 120 N.E. 735; State Treasurer v. West Side Trucking Co. 233 N.Y. 203, 135 N.Y. 244; Hansen v. Turner Constr. 224 N.Y. 331, 120 N.E. 693; And to the same effect are Kelley's case, 123 Me. 261, 122 Atl. 580; Royal v. Hawkeye Portland Cement Co. 195 Iowa, 534, 192 N.W. 406; Reck v. Whittlesberger, 181 Mich. 463, 148 N.W. 247, Ann. Cas. 1916C, 771, 5 N.C.C.A. 917; Garfield Smelting Co. v. Industrial Commission, 53 Utah 133, 178 Pac. 57; Rockfeller v. Industrial Commission, 58 Utah 124, 197 Pac. 1038; Valentine v. Weaver, 191 Ky. 37, 228 S.W. 1036; Riley v. Carnegie Steel Co. 276 Pa. 82, 119 Atl. 832,' * * *'

Bethlehem Steel Co. v. Traylor, 148 Atl. 246,
73 ALR 479, 483.

The Michigan Court held, to make the facts found by the Board conclusive, they must be based upon competent legal evidence, and not on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence.

Reck v. Whittlesberger, 148 N.W. 247.

Such also is the rule laid down by American Jurisprudence, viz.:

"It is sometimes provided in compensation acts that the finding of the administrative tribunal as to certain facts or issues shall be final, or that findings of fact generally, in the absence of fraud, shall be conclusive. Such a provision is operative, however, only where the finding is supported by evidence."

58 *Am. Jur.*, 882, Sec. 483.

The Alaska Act on this topic reads:

“An award by the full Board shall be conclusive and binding as to all questions of fact; but, either party to the dispute, within 30 days from the date of such award, if the award be not in accordance with law, may bring injunction proceedings, mandatory, or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award.”

Sec. 43-3-22, ACLA 1949.

Appellee Landro having adduced no evidence at the hearing to support the Board's findings, they are neither conclusive nor binding, and the lower Court should have set them aside.

The Illinois Court so held under similar language of its act.

“If the coroner's verdict in this case is held to be competent evidence, it is as clear as any proposition can well be made that plaintiff in error is to be held liable upon the declarations of Cloyes, now deceased, made at a time when he was a real party in interest and in his own interest, and without the sanction of an Oath, and under circumstances that the declarations could not possibly be met or refuted by plaintiff in error by other evidence, or even by the right of cross-examination. This is so because the circuit court and this Court, under our Compensation Act, can only pass upon questions of law, and cannot reverse the order of the Industrial Commission for insufficiency of the evidence, unless we can say that there is no competent evidence in the record tending to support such order. It is equally clear

that there was no competent evidence before the coroner's jury or the Industrial Commission showing or tending to show that the injury to the deceased arose out of and in the course of his employment, unless we hold that the unsupported verdict of the coroner's jury, is competent evidence for such purpose. Plaintiff in error was not a party to the proceedings before the coroner's jury, was not present and had no right to be present or represented in that proceeding, had no choice or right of choice in the selection of the jury, did not cross-examine and had no right to cross-examine the witnesses before that jury, or to contradict the evidence tending to prove the liability against it which it is claimed the verdict of that jury now establishes. To hold that that verdict has that effect is to condemn plaintiff in error without a hearing, and to violate the most elementary and sacred rules for the administration of justice between private individuals, guaranteed by our laws and our Constitution, both state and national."

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. 606, 6 ALR 543;

Libby, McNeill & Libby v. Board, 11 AR 327, 333.

This doctrine is also at least impliedly sustained in *Phillips v. Industrial Commission*, 61 NE 2d (Ill.) 681, 172 ALR 372, 377.

Appellant contends that even Landro's incompetent evidence does not show his temporary total disability continued until May 20, 1949, and that, in any event, the Board's finding is not conclusive upon this or the

lower Court unless it is based upon the weight of competent evidence.

**(B) AWARD SHOULD HAVE BEEN BASED ON DR. GRAY'S
COMPETENT EVIDENCE.**

Inasmuch as Dr. Gray's testimony was competent evidence, adduced according to legal rules for the admission of evidence, and relevant to the subject, without its credibility being attacked in any manner, it is binding and conclusive not only upon the Board but also upon the lower Court, and, inasmuch as he testified that in his opinion Landro's temporary disability ended on October 1, 1948, by stating, "I also noted when I examined him on September 30, 1948, that I felt that he had made satisfactory progress, that he was fit to work, and that his temporary disability would be terminated on October 1, 1948" (R. 21-22), in the absence of any competent evidence to the contrary the Board should have found, in fact had no evidence upon which to base any finding other than that Landro's temporary total disability ended on October 1, 1948.

Under those condtions the Board's finding that Landro's temporary total disability continued to May 20, 1949, (R. 34) and he was entitled to temporary total disability compensation until May 20, 1949, was neither conclusive nor binding upon the lower Court.

To the contrary, the lower Court should have modified that finding and based its opinion upon the only

competent evidence, namely, that of Dr. Gray, and held that Landro's temporary disability ended October 1, 1948, and that he was entitled to no further total temporary disability compensation because he had already admittedly been paid his total temporary disability compensation of \$680.76 to September 30, 1948 (R. 39).

Appellant further contends that for like reasons the Board should have found, under the only competent evidence adduced before it, namely, by the deposition of Dr. Gray, that Landro had suffered 10% permanent disability (R. 18), and awarded him 10% permanent disability compensation therefor, but which Landro would not have been entitled to have been paid without first crediting thereon the temporary disability compensation already paid him of \$680.76.

We do not further discuss this particular point because the Board made no finding upon it (Award 2nd paragraph, R. 34); hence, seemingly, inasmuch as no one can predict whether or not such further hearing ever will be held, appellant cannot make any complaint now of the unnecessary expense it will incur if any when such further hearing is held on this particular disability phase although it could properly have been decided upon Dr. Gray's competent evidence regarding it.

Appellant, however, submits that the lower Court had jurisdiction to have modified the Board's award in this respect.

ATTORNEY FEE NOT TAXABLE AS COSTS AGAINST UNSUCCESSFUL LITIGANT ON APPEAL TO DISTRICT COURT FOR REVIEW OF ALASKA INDUSTRIAL BOARD'S AWARD.

Question 2 (Point 6, R. 82).

The District Court in its judgment allowed as costs an attorney fee of \$200.00 to appellee Landro (R. 75) for the services of his attorney in the proceedings before the District Court.

The error of this allowance is the subject of Appellant's "Statement of Points" 6. (R. 82).

Alaska has no statute under which an attorney fee can be allowed as an item of costs to the successful litigant, unless under the general statute providing:

"Disbursements allowed to party entitled to costs. Party's right to witness' and attorney's fees. A party entitled to costs shall also be allowed for all necessary disbursements, * * * ; * * * and a reasonable attorney's fee to be fixed by the Court."

Sec. 55-11-55, ACLA 1949.

The words "and a reasonable attorney's fee to be fixed by the Court" were included in the statute by amendment in 1947.

Ch. 84, ASL 1947.

The same words were in Section 1, Ch. 38, ASL 1923, which were construed in this Court's decision.

Pond v. Goldstein, 41 F. (2d) 76, 5 AFR 544, 556;

Forno v. Coyle, 75 F. (2d) 692; 5 AFR 758, 766.

Appellant does not contend that Sec. 55-11-55, ACLA 1949, is invalid. It contends that that statute is not applicable to this proceeding which was an appeal for review by the District Court of a decision and award by the Alaska Industrial Board in favor of an injured employee under the Alaska Workmen's Compensation Act. (Full text, Appendix A).

This Court said, in discussing allowance of attorney's fee in a case where Ch. 58, ASL 1937, had amended Ch. 38, ASL 1923, by removing the words "and a reasonable attorney's fee to be fixed by the Court" two days before entry of judgment, viz.:

"The assignment is well taken. The right to costs is purely statutory. No such right existed at common law. *Day v. Woodworth*, 13 How. 363, 372, 14 L. ed. 181. No party is entitled to costs until he prevails in the suit, in other words, until judgment is entered. Whatever the statute provides at that time is the measure of his allowable costs. As was said in *Begbie v. Begbie*, 128 Cal. 154, 155, 60 P. 667, 49 LRA 141:

'The right to recover costs exists solely by virtue of statutory provision. * * * and their recovery is governed by the statute in force at the time the right to have them taxed accrued.' "

Mutual, etc., Ass'n. v. Moyer, 94 F. (2d) 906, 9 Alaska Reports 235, 240; cer. den. 304 US 581.

Section 10 of the Workmen's Compensation Act of Alaska provides:

"Right to compensation exclusive. The right to compensation for an injury and the remedy

therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and *no rights or remedies, except those provided for by this Act, shall accrue to employees* entitled to compensation under this Act while it is in effect.
 * * *” (Emphasis supplied).

Appendix A, Page 22, *Infra*.

Section 17 of the Act further says:

“* * * In all proceedings before the Industrial Board or in any Court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.”

Appendix A, Page 32, *Infra*.

Appellant contends that this provision is solely procedural, providing only for the manner of awarding and taxing costs, and not a statutory authorization that attorney's fees may be taxed as costs.

Appellant contends that such conclusion is logically premised upon the subsequent language in Section 23 of the Act, and that such later language is a specific limitation upon and restriction of the quoted language from Section 17, if it can be construed as a grant of authority, namely:

“The fees of attorneys and physicians, and the charges of nurses and hospitals, for services under this Act shall be subject to the approval of the Industrial Board. When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claim-

ant's attorney's fees. The fee so fixed shall be binding upon both the claimant and his or her attorney, and *the employer shall pay to the attorney out of the award*, the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. * * *'' (Emphasis supplied).

Appendix A, Page 39, *Infra*.

This language, appellant submits, distinctly shows that the legislature intended that the injured employee should not receive additional compensation by way of attorney's fees in any proceedings under the Act either before the Board or the District Court.

In this instance, it happens that the unsuccessful litigant is appellant who was the employer. But sauce for the goose should be sauce for the gander. It is entirely possible that an injured employee might be, in fact in instances he has been, the unsuccessful litigant on such an appeal. It scarcely seems possible that the Workmen's Compensation Act intended, should an injured employee appeal to the District Court from what he thought was an erroneous decision of the Board, that he might be charged with the fee of the employer's lawyer in that review or appeal proceedings should the District Court sustain the Board's decision.

Appellant concedes the dearth of authority on this question, which has not to its knowledge previously been presented to this Court, but it maintains that the provisions of Section 55-11-55, ACLA 1949, *supra*, are inapplicable in this proceedings in the absence

of specific authority for the application thereof by the Workmen's Compensation Act and in view of the latter's specific restriction of attorney fees to be paid out of the awarded compensation under Section 23 of the Act, (Page 41, Supra); hence, that the District Court was without jurisdiction in its judgment (R. 75) to adjudge that appellant should pay appellee Landro an attorney fee of \$200.00.

Appellant submits that the lower Court's previous decision in

United Benefit Life Ins. Co. v. Elliott, et al.,
11 Alaska Reports 466, 476,

wherein it held that the plaintiff in an interpleader suit was not entitled to attorney fees as an allowable cost under then Section 4065, CLA 1933, which is now Sec. 55-11-55, ACLA 1949, supra, with the added amendments, spoken of in that decision, of Chapters 58, ASL 1937, and 84, ASL 1947, clearly show that it could not allow the \$200.00, or any sum, for attorney fees as allowable costs in this suit because this proceedings is not within the purview of the classes of cases mentioned in Section 55-11-52, ACLA, 1949, formerly Section 4062, CLA 1933.

"Chapter 2, Title 56", mentioned in the 2nd subparagraph of Section 55-11-52, ACLA 1949, is "Actions by and against Public Corporations", Sections 56-2-1 to 56-2-4, ACLA 1949, Code of Civil Procedure, Volume 3, ACLA 1949, formerly Chapter CII, Sections 3816 to 3819, ACL 1933.

"Chapter 4, Title 56", mentioned in 2nd subparagraph of Section 55-11-52, ACLA 1949, is "Actions

to Avoid Charters and to Prevent the Usurpation of an office or franchise and to determine the right thereto," Sections 56-4-1 to 56-4-14, ACLA 1949, Code of Civil Procedure, Volume 3, ACLA 1949, formerly Chapter CIII, Sections 3824 to 3837, ACL 1933.

CONCLUSION.

For the foregoing reasons appellant urges that the judgment of the District Court and the decision and award of the Alaska Industrial Board should be reversed and modified to holding that appellee Landro's total temporary disability ended on October 1, 1948, for which he was entitled to be paid total temporary compensation of \$680.76 only, which was paid to him prior to his making and filing his claim herein (R. 39); and, that the decision of the District Court should be reversed in allowing appellee Landro an attorney fee of \$200.00, or any sum, as an allowable cost for the services of his attorney in the proceedings on the appeal before the District Court.

Dated, September 6, 1950.

Respectfully submitted,

R. E. ROBERTSON,

ROBERT W. HOLLAND,

BOGLE, BOGLE & GATES,

Attorneys for Appellant.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

Compilation of Workmen's Compensation Act of Alaska, Chapter 9, SLA 1946, entitled

“AN ACT. Relating to the measure and recovery of compensation of injured employees in all businesses, occupations, work, employments and industries in the Territory of Alaska, except domestic service, agriculture, dairying and the operation of railroads as common carriers, and relating to the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such businesses and industries; providing for a second injury fund; creating an Industrial Board, and defining its duties; making the Territorial Department of Labor the administrative agency to carry into effect the provision of this Act; providing for penalties, and repealing Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska, 1933, as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 44, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937.”

as amended by Chapter 45, SLA 1947, entitled

“AN ACT. Amending the Workmen's Compensation Act, Chapter 9, Session Laws of Alaska, 1946, to relieve minor surviving children in remote and isolated sections of the Territory from the consequences of failure to file a claim within the time prescribed by Section 29 of the Act.”,

now compiled as Sections 43-3-1 to 43-3-39, ACLA 1949.

§43-3-1. Employment covered: Compensation allowed: Death benefits: Total and permanent disability: Partial permanent disability: Disfigurement: Temporary disability: Loss of members: Amputations: Other permanent partial injuries: Payments to second injury fund: Fund beneficiaries: Refund of payments to fund: Injury causing permanent disability when combined with previous disability. Any person, or persons, partnership, joint stock company, association or corporation, employing three or more employees in connection with any business, occupation, work, employment or industry, carried on in this Territory, including any department, agency or instrumentality of the Territorial Government, Municipality or Public Utility District, except domestic service, agriculture, dairying, or the operation of railroads as common carriers, shall be liable to pay compensation in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment or to the beneficiaries named herein, as the same are hereinafter designated and defined in all cases where the employee shall be so injured and such injuries shall result in his or her death.

(COMPENSATION ALLOWED.) The compensation to which such employee so injured, or, in case of his or her death, if death results from such injury,

such beneficiaries shall be entitled, and for which such employer shall be legally liable, shall be as follows:

(1) (AMOUNT OF DEATH BENEFITS.) In the event of the death of any such employee resulting from such injury, where such employee at the time of his death was married, his widow shall be entitled to receive the sum of Four Thousand Five Hundred Dollars (\$4,500.00).

(2) (CHILDREN). In those cases where such married employees had a child or children under the age of eighteen (18) years at the time of his death, his widow shall be entitled to receive in addition to the sum above specified, the sum of Nine Hundred Dollars (\$900.00) for each child under the age of eighteen (18) years, or child wholly dependent upon his or her parents for support by reason of mental or physical incompetency, or unborn or posthumous child, which such employee left at the time of his decease, but not to exceed in all the sum of Nine Thousand Dollars (\$9,000.00).

(3) (DEPENDENT PARENTS.) In those cases where such employee left either father or mother or both, dependent upon him for support at the time of his death, the sum of Nine Hundred Dollars (\$900.00) each shall be paid to such father or mother or both, in addition to the sum provided for and made payable to the widow. In no case, however, is the total sum to be paid hereunder to exceed the sum of Nine Thousand Dollars (\$9,000.00) and the payments to which the widow and children may be entitled shall be first

paid out of said sum of Nine Thousand Dollars (\$9,000.00).

(4) (NON-DEPENDENT PARENTS.) In those cases where such deceased employee was unmarried at the time of his or her death survived by either his or her father or mother, such father or mother shall be paid the sum of One Thousand Eight Hundred Dollars (\$1,800.00); and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars (\$195.00) and such other expenses, if any, arising after the injury and before the death not to exceed One Hundred Ninety-five Dollars (\$195.00).

(5) (NON-DEPENDENT PARENTS.) Where such deceased employee was unmarried and was survived by his or her father and mother, such father and mother shall be paid the sum of One Thousand Eight Hundred Dollars (\$1,800.00) each; and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars (\$195.00) and such other expenses, if any, arising after the injury and before his death not to exceed One Hundred Ninety-five Dollars (\$195.00).

(6) (WIDOWER WITH DEPENDENT MINORS: GUARDIAN.) In those cases where such deceased employee was a widower at the time of his death, but left one or more minor orphan children or child wholly dependent upon the deceased for support

by reason of mental or physical incompetency, there shall be paid the sum of Four Thousand Five Hundred Dollars (\$4,500.00), and the further sum of Nine Hundred Dollars (\$900.00) for each orphan child under the age of eighteen (18) years provided the total amount paid shall not exceed Nine Thousand Dollars (\$9,000.00), and the judge of the Probate Court of the precinct wherein such accident or injury occurred, shall appoint a guardian for all of said children, who shall be entitled to, and who shall be paid, the amount specified in this paragraph, for the benefit of said orphan children, and shall divide Four Thousand Five Hundred Dollars (\$4,500.00) thereof equally among such children and divide the surplus, if any, among the children under eighteen (18) years of age.

(7) (AMOUNTS PAID NON-RESIDENT NON-CITIZEN BENEFICIARIES.) Provided, however, that if such beneficiary or beneficiaries as described in subdivisions 1 to 6, inclusive, immediately preceding this subsection be neither resident or a citizen of the United States of America, then the amount due and payable to such beneficiary or beneficiaries shall be in amounts as follows:

(a) As to all beneficiaries, except a wife or minor children, fifty per centum (50%) of the sum set forth in subdivisions 1 to 6, immediately preceding, and fifty per centum (50%) shall be paid to the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(b) As to a wife or minor children, sixty per centum (60%) of the sums set forth in subdivisions 1 to 6 immediately preceding, and forty per centum (40%) of the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(8) (FUNERAL EXPENSES: PAYMENT TO SECOND INJURY FUND). In those cases where such deceased employee was, at the time of his or her death unmarried, and leaves no children nor father nor mother, the employer shall be required to pay the funeral expenses of the deceased not to exceed the sum of One Hundred Ninety-five Dollars (\$195.00), and such other expenses, if any, arising after the injury and before the death, not to exceed the further sum of One Hundred Ninety-five Dollars (\$195.00), and in addition thereto shall pay to the second injury fund the sum of One Thousand Five Hundred Dollars (\$1,500.00), for the sole benefit of those entitled to participate therein as hereinafter provided.

(SECOND INJURY FUND.) There is hereby created a Second Injury Fund, to be administered by the Commissioner of Labor in accordance with the orders and awards of the Alaska Industrial Board.

(TOTAL AND PERMANENT DISABILITY.) Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally or permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) (MARRIED PERSON.) If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars (\$7,200.00) with Nine Hundred Dollars (\$900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars (\$9,000.00).

(b) (FATHER AND MOTHER.) If such employee at the time of his injury had no wife or children, but has a mother or father, Six Thousand Three Hundred Dollars (\$6,300.00).

(c) (FATHER AND MOTHER.) In cases, where such employee who at the time of his injury had both father and mother, Six Thousand Five Hundred Dollars (\$6,500.00).

(d) (MINOR CHILDREN). In those cases, where such employee was at the time of his injury, a widower, or was divorced, but had minor children, he shall receive the sum of Six Thousand Dollars (\$6,000.00), with an additional sum of Nine Hundred Dollars (\$900.00) for each child below the age of eighteen (18) years, provided that the total sum to be paid such employee shall not in any case exceed the sum of Nine Thousand Dollars (\$9,000.00).

(e) (NO DEPENDENTS.) In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother, he shall receive the sum of Six Thousand Dollars (\$6,000.00).

(PARTIAL PERMANENT DISABILITY.)

Where any such employee receives an injury arising out of, and in the course of his or her employment, resulting in his or her partial permanent disability, he or she shall be paid in accordance with the following schedule:

For the loss of a Thumb:

1 (a) In case the employee was at the time of the injury unmarried, \$720.00.

1 (b) In case the employee was married but had no children, \$900.00.

1 (c) In case the employee was either married or a widower, but had one or more children, \$1,080.00.

For the loss of an Index Finger:

2 (a) In case the employee was at the time of the injury unmarried, \$450.00.

2 (b) In case the employee was married but had no children, \$585.00.

2 (c) In case the employee was either married or a widower, but had one or more children, \$720.00.

For the loss of any other finger than the Index Finger and Thumb, \$270.00.

For the loss of a Great Toe, \$450.00.

For the loss of any other Toe other than the Great Toe, \$180.00.

For the loss of a Hand:

3 (3) In case the employee was at the time of the injury unmarried, \$2,160.00.

3 (b) In case the employee was married but had no children, \$2,880.00.

3 (c) In case the employer was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Arm:

4 (a) In case the employee was at the time of the injury unmarried, \$2,700.00.

4 (b) In case the employee was married but had no children, \$3,600.00.

4 (c) In case the employee was either married, or a widower and had one child, \$3,600.00 and \$450.00 additional for each such additional child, the total amount not to exceed, however, \$4,500.00.

For the loss of a Foot:

5 (a) In case the employee was at the time of the injury unmarried, \$2,160.00.

5 (b) In case the employee was married but had no children, \$2,700.00.

5 (c) In case the employee was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, but not to exceed the total sum of \$3,600.00.

For the loss of a Leg:

6 (a) In case the employee was at the time of the injury unmarried, \$2,700.00.

6 (b) In case the employee was married but had no children, \$3,600.00.

6 (c) In case the employee was either married, or a widower and had but one child, \$3,600.00 with \$450.00 for each such additional child, not to exceed the total sum of \$4,500.00.

For the loss of an Eye:

7 (a) In case the employee was at the time of the injury unmarried, \$2,160.00.

7 (b) In case the employee was married but had no children, \$2,880.00.

7 (c) In case the employee was either married, or a widower and had one child, \$2,880.00 plus \$360.00 for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Ear: \$360.00.

For the loss of hearing in one Ear: \$720.00.

For the loss of the Nose: \$720.00.

Compensation for permanent total loss of use of a member shall be the same as for the loss of such member.

(DISFIGUREMENT.) The Industrial Board may award proper and equitable compensation for serious head, neck, facial, or other disfigurement, not exceeding, however, the sum of Two Thousand Dollars (\$2,000.00).

(TEMPORARY DISABILITY.) For all injuries causing temporary disability, the employer shall pay

the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.

(LOSS OF MEMBERS AS TOTAL PERMANENT DISABILITY.) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or

any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability.

(AMPUTATIONS.) Amputation between the elbow and the wrist shall be considered equivalent to the loss of an arm, and amputation between the knee and ankle shall be considered equivalent to the loss of a leg.

(OTHER PERMANENT PARTIAL INJURIES.) Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars (\$7,200.00).

To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars (\$7,200.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her

earning capacity twenty-five per centum (25%), he or she would be entitled to receive One Thousand Eight Hundred Dollars (\$1,800.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars (\$7,200.00) that twenty-five per centum (25%) does to one hundred per centum (100%). Should such employee receive an injury that would impair his or her earning capacity seventy-five per centum (75%), he or she would be entitled to receive Five Thousand Four Hundred Dollars (\$5,400.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars (\$7,200.00) that seventy-five per centum (75%) does to one hundred per centum (100%).

(9) (PAYMENTS TO SECOND INJURY FUND.) Whenever an employee shall suffer a compensable injury which results in permanent partial disability by reason of the total or partial loss or loss of use of a member or members, as provided in Paragraph (8) hereof, and which injury entitled him or her to compensate pursuant to such Paragraph (8), the employer, or his insurance carrier, shall, in addition to the compensation provided for in said Paragraph (8), pay into the second injury fund a lump sum, without interest deductions, equal to two per centum (2%) of the total compensation to which the employee is entitled under said Paragraph (8) of this section for the said permanent partial disability, the said sum to be paid into such second injury fund as soon as the total amount of the permanent partial dis-

ability payable for the particular injury is determined by the Industrial Board.

(10) (SECOND INJURY FUND BENEFICIARIES.) The sums required to be paid into the second injury fund under the provisions of Paragraph (7), (8) and (9) of this section shall be paid into said second injury fund of the Commissioner of Labor for the sole benefit of those entitled to participate therein under the provisions of Paragraph (12) of this section, the same to be paid out by said Commissioner of Labor in accordance with the orders and awards of the Industrial Board.

(11) (REFUND OF PAYMENTS TO SECOND INJURY FUND.) In case a deposit or payment has been made into such second injury fund, as provided in Paragraph (7) of this section, and it is later shown that there are other beneficiaries or that the beneficiaries designated are entitled to further or greater benefits, or, as provided in Paragraph (8) of this Section, and it is later shown that there are beneficiaries entitled to compensation, or, if deposits or payment has been made pursuant to Paragraph (9) hereof by mistake or inadvertence or under such circumstances that justice requires a refund thereof, the Industrial Board is hereby authorized to refund such deposit or payment.

(12) (INJURY CAUSING TOTAL PERMANENT DISABILITY WHEN COMBINED WITH PREVIOUS DISABILITY.) In those cases where an employee receives an injury arising out of and in

the course of his or her employment which, of itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability out of the second injury found hereinbefore created and provided.

§ 43-3-2. Treatment and care of injured employees:
Duty and liability of employer: Duration: Prevailing fees: Selection of physicians, surgeons and hospitals: Aggravation of injuries by incompetence or neglect of physician: Liability: Right of employee to provide physician. The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus for such period as the nature of the injury or the process of recovery may require, not exceeding one year from and after the date of injury to any such employee. The employer shall be liable for the payment of the expenses of medical, surgical or other attendance or treatment, nurse, and hospital service, medicine, crutches, and apparatus necessitated by the injury of an employee, for such period as the nature of the injury or the process of recovery may require, not exceeding one

year from and after the date of injury to any such employee. All fees and other charges for such treatment and services shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living. The employer shall have the exclusive right, and it shall be his duty to select and furnish the necessary physicians, surgeons and hospitals and to that end he may enter into all necessary contracts with such physicians, surgeons and hospitals for the furnishing of such services and treatments. Provided, that if it be made to appear in any suit, action or proceeding brought against the employer that the injuries sustained by the employee were aggravated on account of the incompetence or neglect of the physician or surgeon selected by the employer, it shall be prima facie evidence that the employer failed to use due care in the selection of such physician or surgeon and in such case the employer and physician or surgeon shall be jointly and separately liable for all damages resulting from such incompetence or neglect. Nothing contained in this section shall be construed to limit the right of the employee, to provide in any case, at his own expense, a consulting physician or any attending physician whom he may desire.

§ 43-3-3. Time and manner of paying compensation: Interest: Failure to pay compensation: Penalty. All compensation allowed hereunder for temporary disability shall be paid periodically and promptly in like manner as wages, and as it accrues, and directly to the person entitled thereto, without waiting for an

award by the Industrial Board, and shall bear interest from and after the period of thirty days after the date of the injury by which the claim for compensation arose at the rate of eight per centum (8%) per annum until paid. If the employer or insurance carrier shall fail to pay any installment of compensation within twenty days after the same becomes due, there shall be paid by the employer, or his insurance carrier, an additional sum equal to ten per centum (10%) of the compensation then due, unless such delay or default is excused by the Industrial Board, on the application of the employer or insurance carrier and upon the ground that owing to conditions over which the employer or insurance carrier had no control, such payment could not be made.

In all other cases, compensation shall be paid bi-weekly, monthly, or otherwise, as the Industrial Board may determine to be for the best interest of the injured employee or his or her beneficiaries; and such payments shall bear interest from and after the period of thirty days after the date of the order or award. If the employer or insurance carrier shall fail to pay compensation according to the terms of such order or award within twenty days thereafter, except in the case of an appeal, there shall be paid by the employer, or his insurance carrier, an additional sum equal to twenty per centum (20%) of the compensation due.

§ 43-3-4. Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time. If an injured employee (is)

entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from a date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury.

§ 43-3-5. Lien to secure compensation: Extent: Priority and rank: Notice of lien: Filing and contents: Enforcement: Attachment. Every employee and every beneficiary entitled to compensation under the provisions of this Act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fees therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning plant or establishment and all property used in connection therewith; and the same shall be the case with all other businesses, industries, works, occupations and employments. The lien herein provided for shall be prior and paramount and superior to any other lien of the property affected thereby, except liens for wages or materials as is now or may hereafter be provided by law, and shall be of equal rank with all such liens for wages or materials. The lien hereby provided for shall extend to and cover all right, title, interest and claim of the employer of, in and to the property affected by

such lien. Any person claiming a lien under this Act shall, within four months after the date of the injury from which the claim of compensation arises, file for record in the office of the recorder of the precinct in which the property affected by such lien is situated a notice of lien signed and verified by the claimant or some one on his or her behalf, and stating substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of such injured or deceased person at the time of such injury or death, a description of the property affected or covered by the lien so claimed, and the name of the owner or reputed owner of such property.

The lien for compensation herein provided may be enforced by a suit in equity as in the case of the enforcement of other liens upon real or personal property, at any time within ten months after the cause of action shall arise. Nothing in this Section contained shall be deemed to prevent an attachment of property as security for the payment of any compensation as in this Act provided.

§43-3-6. Compromise: Filing memorandum: Approval by Board: Effect: When agreement to be approved. At any time after death, or after seven days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, shall have the right to reach an agreement in regard to any claim for injury or death hereunder in accordance with the schedule hereof, but

a memorandum of the agreement, in a form prescribed by the Industrial Board shall be filed with the Board, otherwise the same shall be void for any purpose. If approved by the Board, such agreement shall be enforceable the same as any order or award of the Board, and subject only to modification in accordance with the provisions of Section 4 hereof (§ 43-3-4 herein). Such agreement shall be approved by the Board only when the terms conform to the provisions of this Act, and, if it involves or is likely to involve permanent disability, only after an impartial examination and an opportunity to be heard.

§43-3-7. Injuries not covered. No compensation shall be allowed or paid for the injury or death of an employee in any case where such injury or death was occasioned by his or her wilful intention to bring about the injury or death of himself or herself or of another, or where the employee's intoxication was the proximate cause of injury.

§ 43-3-8. When right to compensation accrues: Period of incapacity: Report to employer: Compensation not to be paid prior to report. No compensation shall be paid hereunder for any injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury. It shall be the duty of every person claiming compensation under the provisions of this Act for any injury sustained by him to make or cause to be made, a report thereof to his em-

ployer as soon as practicable after sustaining the same, and no compensation shall be paid prior to the day on which such report is made.

§43-3-9. Presumption of employment: "Independent contractors" defined. Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this Act. The term "independent contractor" shall be taken to mean, for the purpose of this Act, any person who renders service, other than manual labor, for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

§43-3-10. Right to compensation exclusive: Failure to secure insurance: Election of remedies: Pleading or proof of contributory negligence unnecessary: Defenses barred. The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the person or legal representative, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for

self-insurance, then any injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee.

§ 43-3-11. Step-parents, adopted children, and step-children: How regarded. Step-parents shall be regarded in this Act as parents, and an adopted child, or adopted children, or a step-child or children, shall be regarded in this Act as issue of the body.

§ 43-2-12. Statement of beneficiaries by employee: Change in beneficiaries or address: Notice to beneficiaries: Form: Failure to list or notify beneficiaries: Employee's statement as evidence: Service of notice of claim.

(a) (STATEMENT OF BENEFICIARIES BY EMPLOYEE.) Every employer coming within the provisions of this Act shall require of every employee who shall execute the same, either at the time he or she is employed or thereafter, a written statement showing the name or names of each and all persons that would be entitled to benefits under the provisions of this Act in case such employee should become deceased

as a result of any injury received by him, or her, arising out of and in the course of his or her employment, such written statement shall bear the date upon which the same shall be furnished to the employer, and shall be signed by the employee. Provided, that, in cases where such employee is unable to write his or her name, his or her name may be affixed to such statement by another, and such employee shall make his or her mark in the manner customary in such cases and such mark shall be made in the presence of at least one witness, who shall subscribe such statement as a witness. In all cases the employee shall be furnished a duplicate of the said statement.

(b) (CHANGE IN BENEFICIARIES OR ADDRESS THEREOF.) In all cases where there shall be a change of beneficiaries, or a change in the address of any beneficiary, the employee may furnish the employer with a new statement showing such change, such new statement to be so furnished shall in all respects conform and comply with the provisions hereof with reference to the original statement to be furnished.

(c) (NOTICE TO BENEFICIARIES.) In all cases where such statement, or statements, is, or are, furnished the employer by the employee, the employer shall, if such employee becomes deceased as a result of an injury received in the course of his or her employment, notify each beneficiary named in the last statement of the fact; such notice shall be given by sending each beneficiary at the address given in the last statement furnished a copy of such notice by

registered mail, and an envelope containing such notice addressed to each beneficiary at the address given in said last statement furnished, shall be deposited in the post office and registered, within ten days after such employee shall have become deceased.

(d) (NOTIFICATION FORM.) The notice to be given shall be substantially in the following form:

To (giving the name of the beneficiary).

This is to advise you that.....
(giving the name of the deceased person) became deceased on the day of.....
as a result of an injury received while in the employ of..... You will take notice that all persons entitled to benefits because of the fact that the above named employee was injured and as a result thereof became deceased, under the laws of Alaska, are required to serve notice upon the employee with one hundred and twenty (120) days after the date on which such employee became deceased, in accordance with the provisions of the laws of Alaska upon that subject, and that failure to serve such notice within the time specified and in the manner specified will result in depriving the beneficiary, failing to give such notice within such time and in such manner, of his or her rights to compensation under the laws of Alaska.

(e) (FAILURE OF EMPLOYEE TO LIST BENEFICIARIES.) Any failure on the part of the employee to supply the employer with a statement as hereinabove provided shall not work a forfeiture of

the right of his or her beneficiaries to benefits hereunder.

(f) (FAILURE OF EMPLOYER TO NOTIFY BENEFICIARIES.) In cases where the employer shall have been furnished with such statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and manner herein provided, such beneficiaries who have not been so notified shall have the right to notify the employer of their claims to benefits and file claims and prosecute actions or other proceedings for the recovery thereof, notwithstanding the fact that such notice was not served as hereinafter provided within the period of one hundred and twenty (120) days from and after the time the employee became deceased.

(g) (EMPLOYEE'S STATEMENT AS EVIDENCE.) Upon the trial of any issue relating to a beneficiary's right to compensation under this Act, any written statement furnished an employer, as hereinabove provided, may be offered in evidence and shall be prima facie but not conclusive evidence that there are no other beneficiaries.

(h) (NOTICE OF BENEFICIARY'S CLAIM: SERVICE.) In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in such employee's death, someone in his or her behalf shall within one hundred and twenty (120) days from and after the death of such employee serve a written notice upon

the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such persons were dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by delivering a copy thereof to the employer or the employer's agent in person or by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with some person over the age of eighteen (18) years in the employ of such employer, or by mailing the same by registered mail, addressed to said employer at his last known business address. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by registered mail upon the Industrial Board, and it shall be the duty of such Industrial Board to publish the same in one issue of any newspaper of general circulation published in the Judicial Division where the injury, out of which the right to compensation arose, occurred. Failure to give such notice shall not bar any claim (1) if the employer or his agent in charge of the business at the place where the injury occurred, or the insurer, had knowledge of

the injury or death and the Industrial Board determines that the employer or insurer has not been prejudiced by the failure to give such notice; or (2) if the Industrial Board finds that there was good cause for not giving such notice; Provided that no objection based on such failure shall be considered unless made at the first hearing of the claim before the Board. In case of doubt as to the proper beneficiaries, the employer shall submit the matter to the determination of the Industrial Board.

§43-3-13. Notice in non-fatal cases: No compensation until notice or knowledge: Defective notice: Prejudice: Contents of notice: Signature and service. In all cases of injury not resulting in death, unless the employer or his agent shall have actual knowledge of the occurrence of the injury at the time thereof, or shall acquire such knowledge afterward, the injured employee, or someone in his or her behalf, as soon as practicable after the injury, shall give written notice to the employer of such injury, such notice may be given in the manner provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

Unless such notice is given or knowledge acquired within sixty days from the date of the injury, no compensation shall be paid until and from the date such notice is given or knowledge obtained, but no lack of knowledge by the employer or his agent and no want, failure, defect or inaccuracy of the notice shall bar compensation, unless the employer was prejudiced thereby, and then only to the extent of such prejudice.

The notice provided for in this Section shall state the name and address of the employee, the time, place, nature and cause of the injury, and shall be signed by the employee, as provided in paragraph (a) of Section 12 (§ 43-3-12 herein), or by some one in his or her behalf, and served as provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

§ 43-3-14. Rules: Process and procedure to be summary and simple: Powers of board: Subpoenas: Service and fee: Fees and mileage of witnesses. The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof. Process and procedure under this Act shall be as summary and simple as reasonably may be. The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to have examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

Subpoenas of the Board shall be served by the marshal, or any deputy marshal, or by a person specially appointed by the marshal. The fees shall be the same as fees now provided by law for like service in civil actions. Each witness who appears in obedience to such subpoena of the Industrial Board shall receive for attendance the fees and mileage for witnesses in civil cases in the courts.

The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper

proceedings, the attendance and testimony of witnesses and the production and examination of books, papers and records.

§ 43-3-15. Procedure in disputed claims: Application for hearing: Fixing time and place of hearing: Where hearing to be held: Determination: Filing award: Copies to parties. If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6 (§ 43-3-6 herein), and afterwards disagree as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred, unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined

by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 (§ 43-3-4 herein) nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties.

§ 43-3-16. Review by full Board: Application: Time for: Award: Filing: Copies. If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.

§ 43-3-17. Judgment on agreement or award: Effect: Modification: Costs. Any party in interest may file in the District Court for the division in which the employer resides or has his place of business, a certified copy of the memorandum of agreement approved by the Board, or of an order or decision of the Board, or of an award of the full Board unappealed from, or of an award of the full Board affirmed upon an appeal, whereupon said court shall render judgment in

accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment had been rendered in a suit duly heard and determined by said court.

Any such judgment of said District Court unappealed from or affirmed on appeal or modified in obedience to the mandate of the Appellate Court, shall be modified to conform to any decision of the Industrial Board, ending, diminishing or increasing any payment under the provisions of Section 4 of this Act (§ 43-3-4 herein), upon the presentation to it of a certified copy of such decision.

In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.

§43-3-18. Insurance or proof of financial ability: Deposit of security. Every employer under this Act, except those exempted by Section 1 (§ 43-3-1 herein), shall either insure and keep insured his liability hereunder in some insurance company or association duly authorized to transact business of Workmen's Compensation Insurance in the Territory, or shall furnish to the Industrial Board satisfactory proof of his financial ability to pay direct the compensation provided for in this Act. In the latter case the Board may, in its discretion, require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

§ 43-3-19. Filing evidence of compliance: Exception: Failure to comply. Every employer under this Act, except those exempted therefrom by Section 1 (§ 43-3-1 herein), shall, within ten days after this Act takes effect, file with the Industrial Board, in the form prescribed by it, and thereafter within ten days after the termination of his insurance by expiration or cancellation, evidence of his compliance with the insurance provisions of Section 18 (§ 43-3-18 herein) and all others relating to insurance under this Act; provided, that this requirement shall not apply to employers who have procured from the Industrial Board certificates of their financial ability to pay compensation directly without insurance.

Any employer hereafter coming under the compensation provisions of this Act shall, in like manner, file like evidence of such compliance.

If such employer fails, refuses, or neglects to comply with the provisions of this Section, he shall be subject to the penalties provided in Section 24 (§ 43-3-24 herein) for failure to report accidents; but nothing herein contained shall be construed as affecting the rights conferred upon injured employees or their beneficiaries under Section 10.

§ 43-3-20. Self-insurance certificates: Revocation: New certificate. Whenever an employer has complied with the provisions of Section 18 (§ 43-3-18 herein) relating to self-insurance, the Industrial Board shall issue to such employer a certificate which shall remain in force for a period fixed by the Board, but the Board may, upon at least ten days' notice and a hear-

ing, revoke the certificate of such employer upon satisfactory proof that such employer is no longer entitled thereto.

At any time after such revocation the Board may grant a new certificate to the employer, upon his petition and satisfactory proof of his financial ability as provided in Section 18 (§ 43-3-18 herein).

§43-3-21. Insurance policies: Approval by Insurance Commissioner: Presumption of coverage: Limitation of liability: Policy provisions.

(APPROVAL BY INSURANCE COMMISSIONER.) No insurer shall enter into or issue any policy of insurance under this Act until its policy form shall have been submitted to and approved by the Insurance Commissioner. The Insurance Commissioner shall not approve the policy form of any insurance company until such company shall file with it the certificate of the Commissioner of Insurance showing that such company is authorized to transact the business of Workmen's Compensation Insurance in the Territory. The filing of a policy form by any insurance company with the Industrial Board for approval shall constitute, on the part of such company, a conclusive and unqualified acceptance of each and all of the provisions of this Act, and an agreement by it to be bound thereby.

(PRESUMPTION OF COVERAGE.) All policies of insurance companies insuring the payment of compensation under this Act shall be conclusively presumed to cover all the employees and the entire com-

compensation liability of the insured employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such policy or agreement.

(LIMITATION OF LIABILITY VOID.) Any provision in any such policy attempting to limit or modify the liability of the company issuing the same shall be wholly void except as provided in the preceding paragraph.

(REQUIRED POLICY PROVISION.) Every policy of any such company must contain the following provisions:

(a) (EXTENT OF COVERAGE.) The insurer hereby assumes in full all the obligations to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicine, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits imposed upon the insured under the provisions of the Alaska Workmen's Compensation Law.

(b) (SUBJECTION TO ACT.) That the policy is made subject to the provisions of the Alaska Workmen's Compensation Law, and the provisions of said Act relative to the liability of the insured employer to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits to and for said em-

ployees or beneficiaries, the acceptance of such liability by the insured employer, the adjustment, trial and adjudication of claims for such physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits and the liability of the insurer to pay the same are and shall be a part of this policy contract as fully and completely as if written herein.

(c) (NOTICE TO EMPLOYER.) That, as between the insurer and the employee or his or her beneficiaries, notice to or knowledge of the occurrence of the injury on the part of the insured employer shall be notice or knowledge thereof, as the case may be, on the part of the insurer; that the jurisdiction of the insured employer for the purpose of the Alaska Workmen's Compensation Act shall be the jurisdiction of the insurer, and the insurer shall, in all things, be bound by and shall be subject to the orders, awards, judgments and decrees rendered against the insured employer under said Act.

(d) (CONDITIONS OF PAYMENT.) That the insurer will promptly pay to the person or persons entitled to the same, all benefits conferred by the Alaska Workmen's Compensation Act, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and all installments of compensation or death benefits that

may be awarded or agreed upon under said Act; that the obligation of the insurer shall not be affected by any default of the insured employer after the injury, or by any default in giving of any notice required by this policy; that the policy is and shall be construed to be a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation or death benefits, and shall be enforceable in the name of such person or persons.

(e) (NOTICE OF TERMINATION.) That any termination of the policy by cancellation shall not be effective as to the employees of the insured employer covered thereby until ten days after written notice of such termination has been received by the Industrial Board. Provided, however, that if the employer has secured insurance with another insurance carrier, cancellation shall be effective as of the date of such other coverage.

(f) (JOINT LIABILITY.) That all claims for compensation, death benefits, physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, may be made directly against either the employer or the insurer, or both, and the order or award of the Industrial Board may be made against either the employer or the insurer or both.

(g) (REVOCATION BY COMMISSIONER.)

That if any insurer shall fail or refuse to pay any final award or judgment (except during the pendency of an appeal) rendered against it, or its insured, or, if it shall fail or refuse to comply with any provisions of this Act, the Insurance Commissioner shall revoke the approval of the policy form, and shall not accept any further proofs of insurance from it until it shall have paid said award or judgment or complied with the violated provision of this Act, and shall have re-submitted its policy form and received the approval thereof by the Insurance Commissioner.

§ 43-3-22. Award to be final and conclusive: Questions of fact: Injunction proceedings: Certification of questions by Board: Advancement on docket: Early determination: Increase in award. An award of the Board, by less than all of the members, as provided in Section 15 (§ 43-3-15 herein), if not reviewed as provided in Section 16 (§ 43-3-16, herein), shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if such award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the district in which the injury occurred. The orders, writs and processes of the court in such proceeding may run, be served, and

be returned in accordance with the rules of said court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such proceeding unless, upon application for an interlocutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage.

The Board, of its own motion, may certify questions of law to said court for its decision and determination.

All such appeals and certified questions of law shall be advanced upon the docket of said court, and shall be determined at the earliest practicable date, without extensions of time for filing briefs.

Any award of the full Board affirmed on court review at the instance of the employer or his insurance carrier may be increased ten per centum by order of the court.

§ 43-3-23. Fees of attorneys and physicians: Approval: Statement of attorney's fees: Effect and payment: Report by physician. The fees of attorneys and physicians, and the charges of nurses and hospitals,

for services under this Act shall be subject to the approval of the Industrial Board. When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fee. The fee so fixed shall be binding upon both the claimant and his or her attorney, and the employer shall pay to the attorney out of the award, the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. The Industrial Board may withhold the approval of the fees of the attending physician in any case until he shall file a report with the Industrial Board on the form prescribed by such Board.

§ 43-3-24. Records and reports of injuries: Contents of report: Violations as misdemeanor: Punishment. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within one week after occurrence and knowledge thereof, as provided in Sections 12 and 13 (§§ 43-3-12, 43-3-13 herein) of an injury to an employee causing his or her death or absence from work for more than one day, a report thereof shall be made in writing and mailed to the Industrial Board on blanks to be procured from the Board for the purpose.

The said report shall contain the name, nature and location of the business of the employer, the name, age, sex, wages, occupation of the injured employee, the date and hour of the injury and the nature and

cause thereof, and such other information as may be required by the Industrial Board.

Whoever shall fail or refuse to comply with the foregoing provisions, or whoever shall violate any of the provisions of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than Fifty Dollars nor more than Five Hundred Dollars.

§ 43-3-25. Jurisdiction of courts. No court of this Territory except the United States District Court on review, or the United States Circuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties.

§ 43-3-26. Attachment: Procedure: Affidavit: Contents: Insurance of writ without bond: Form, service, execution and return: Undertaking by defendant: Effect.

(a) (AFFIDAVIT: CONTENTS.) A writ of attachment shall be issued by the Clerk of the Court in which any action for the recovery of damages under the provisions of Section 10 (§ 43-3-10 herein) is pending, or by the United States Commissioner in any such action pending in the court of such Commissioner. Whenever the plaintiff or anyone in his behalf shall make and file an affidavit showing that he or she is entitled to recover compensation from the

defendant, under the provisions hereof, but that such defendant has failed to comply with the provisions of Sections 18 and 19 of this Act (§§ 43-3-18, 43-3-19 herein), and the certificate of the Industrial Board to that effect shall be prima facie evidence of the fact, such affidavit must show all the facts necessary to bring the plaintiff within the provisions hereof, and must further set up all the facts necessary to show that a cause of action exists in favor of the plaintiff and against the defendant for the amount sued for and for which the attachment is sought under the provisions hereof.

(b) (ISSUANCE OF WRIT WITHOUT BOND: FORM, SERVICE, EXECUTION AND RETURN.)

Upon filing such affidavit in actions pending as aforesaid with the Clerk of the Court, or, the Commissioner, in actions pending in the court of such Commissioner, the plaintiff shall be entitled to have a writ of attachment issued without filing any bond or other security such writ shall be directed to the marshal and shall in all respects conform to writs of attachment in other cases and shall be issued, served, executed and returned in the same manner that writs of attachment in other cases are now issued, executed and returned.

(c) (UNDERTAKING BY DEFENDANT: EFFECT.) The defendant may, however, file a written undertaking in any pending cause for the benefit of the plaintiff in an amount equal to double the amount sued for, executed by two or more sufficient sureties, to be approved by the Judge or Commissioner in

whose court the action is pending and conditioned that the defendant will pay any judgment that may be awarded against such defendant in the action. No writ of attachment shall issue after such undertaking has been filed by the defendant, and if such undertaking shall be filed after the writ has been issued, such writ shall be quashed and if property has been attached under such writ at the time of the filing of such undertaking, such attachment shall be dissolved and set aside and the property attached and (sic) returned to the defendant.

§ 43-3-27. Physical examination: Submission to: Presence of employee's physician: Privilege: Refusal to submit to examination: Effect: Autopsy: Notice to widow or next of kin. The employee shall after an injury at reasonable times during the continuance of his or her disability, if so requested by his or her employer, or when ordered by the Industrial Board, submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory or State in which such employee may be found, furnished and paid for by the employer, or by the Board. The employee shall have the right to have a physician, provided and paid for by himself or herself, present at such examination or examinations. No fact communicated to, or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in the hearings provided for in this Act, or any action to recover damages against any em-

ployer who is subject to the compensation provisions of this Act. If any employee refused to submit himself or herself to any such examination to examinations provided for herein, his or her rights to compensation shall be suspended until such obstruction or refusal ceases, and his or her compensation, during such period of suspension, may, in the discretion of the Industrial Board, or the court determining an action brought for the recovery of damages hereunder, be forfeited.

The employer, or the Industrial Board, shall have the right in any case of death to require an autopsy at the expense of the party requesting same.

No autopsy shall be held in any case without notice first being given to the widow or next of kin, if they reside in the Territory, or their whereabouts can reasonably be ascertained, of the time and place thereof and reasonable time and opportunity given such widow or next of kin to have a representative present to witness the autopsy shall be suppressed on motion duly made to the Industrial Board, or to the Court, as the case may be.

§ 43-3-28. Waiver or exemption from statute forbidden. No agreement by an employee to waive his or her rights to compensation under this Act shall be valid, except as herein elsewhere provided, and no employer or employee shall exempt himself, herself or itself, except in the manner herein elsewhere provided, from the burden or waive the benefits of this Act, by any contract, agreement, rule, regulation or

device, and any such contract, agreement, rule, regulation or device shall be absolutely void.

§ 43-3-29. Claims barred if not filed within two years. Any and all claims for compensation hereunder shall be barred unless a claim for compensation shall be filed with the Industrial Board within two years after the injury, or, if death results therefrom, within two years after such death, after the injury was sustained, or, in the event of mental incapacity, within two years after the removal of such mental incapacity.

§ 43-3-30. Liability of third persons: Proceedings by employer: Subrogation to employee. Where the injury for which compensation is payable hereunder was caused under circumstances creating a legal liability in someone other than the employer to pay damages in respect thereof, the employee may take proceedings against the one so liable to pay damages and against any one liable to pay compensation under this Act, but shall not be entitled to receive both damages and compensation. And if the employee has been paid compensation under this Act, the employer by whom the compensation was paid shall be entitled to indemnity from the person, firm or corporation so liable to pay damages as aforesaid and to the extent of such indemnity shall be subrogated to the rights of the employee to recover damages therefor.

§ 43-3-31. Report of termination of compensation. Every employer paying compensation directly without insurance, and every insurance carrier paying compensation in behalf of an employer, shall, within ten

days from the termination of the compensation period fixed in any award against him or its insured, for an injury or death, either by the approval of an agreement or upon hearing, and within ten days from the full redemption of any such approved agreement or award, by the cash payment thereof in a lump sum or otherwise, as in this Act or by the order or award of the Industrial Board provided, shall make such report or reports as the Industrial Board may require.

§ 43-3-32. Failure to secure payment: Common law defenses abolished: Presumptions. If such employer fails to provide security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), such employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employee assumed the risks inherent to or incidental to or arising out of his or her employment or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of an employer to furnish reasonably safe tools or appliances, or because the employer exercises reasonable care in selecting reasonably competent employees in the business;

(2) That the injury was caused by the negligence of a coemployee.

(3) That the employee was negligent, unless and except it shall appear that such negligence was wilful

and with intent to cause the injury, or was the result of wilful intoxication on the part of the injured party;

(4) In such actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has failed to provide the security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), it shall be presumed that the injury to the employee was the first result growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence.

§ 43-3-33. Presumption of direct payment: Notice: Posting: Places of posting: Form of notice. Every such employer shall be conclusively presumed to have elected to pay compensation directly to employees for injuries sustained arising out of and in the course of the employ- according to the provisions hereof, unless and until notice in writing of insurance, stating the name and address of the insurance company and the period of insurance, shall have been given to the employee. Such notice shall be posted and kept on the premises of the employer or on the premises where the employer's operations are being carried on in three conspicuous places; one of which shall be at the office of the employer; one at the mess house or boarding house, if there be one, and the third in some conspicuous place on the premises or works. Such recorded and posted notice shall be substantially in the

following form, and the signature shall be witnessed by two witnesses:

EMPLOYER'S NOTICE OF INSURANCE

To the employees of the undersigned:

You and each of you are hereby notified that the undersigned is insured in the.....Insurance Company, whose address is.....and that the period covered by such insurance is.....in accordance with the terms, conditions and provisions to pay compensation to employees of the undersigned for injuries received as provided in the Act of the Territory of Alaska, known as the "Workmen's Compensation Act of the Territory of Alaska."

(Signed).....

Witnesses:

.....
§ 43-3-34. Article to be part of every contract of hire: Construction. This article shall constitute part of every contract of hire, express or implied, and the same shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner hereby provided for all personal injuries sustained, arising out of and in the course of employment.

§ 43-3-35. When excluded employee presumed to accept compensation under this Act: Voluntary Insurance. All employees excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein) shall be conclusively presumed to have elected to take compensa-

tion in accordance with the provisions of Section 33 (§ 43-3-33 herein) in the following cases.

(a) In the event that any employer who employs a person or persons in domestic service, or who is engaged in agriculture, dairying, or the operation of railroads as common carriers, and is, therefore, by reason of the provisions of Section 1 (§ 43-3-1 herein) excluded from the terms, conditions and provisions hereof, voluntarily obtains insurance for the protection of his or its employees for injuries arising out of and in the course of the employment, the rights and remedies hereof shall apply where an employee brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his or her employment, and such employee shall be and remain subject to the provisions hereof the same as if such employment had not been excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein).

§ 43-3-36. Alaska Industrial Board created: Members: Chairman: Powers. A Board is hereby created which shall be known as the "Alaska Industrial Board," to be composed of the following three members: The Territorial Insurance Commissioner, the Attorney General and the Territorial Commissioner of Labor. The Commissioner of Labor shall be Chairman of the Alaska Industrial Board, and shall be the executive officer of the Board, and shall be empowered to perform all acts necessary to carry into effect all provisions of this Act.

§ 43-3-37. Assignment of claim: Waiver of exemption. No claim for compensation, or compensation agreed upon, awarded, adjudged, or paid, shall be assignable, or subject to levy, execution, attachment, garnishment, or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived.

§ 43-3-38. Definition of terms. Wherever the term “employer” is used in this Act, reference is had to the Territory or any of its political subdivisions and to any person or persons, partnership, joint stock company, association or corporation employing three or more persons in connection with any business or industry coming within the scope hereof and carried on in this Territory, and whenever the term “employee” is used herein, reference is had to an employee employed by an employer as above defined.

If the employer is insured, the term “employer” shall include the insurer so far as applicable.

The term “beneficiary” as used herein refers to any person entitled to compensation under the provisions hereof.

The masculine gender, whenever used herein, shall be held to include the feminine and neuter.

For the purpose of this Act, “child” or “children” shall mean a child or children under the age of eighteen years depending upon the injured employee for support.

“Widower” shall include one who is divorced and is not required by decree of divorce to contribute to the support of his former wife.

“Married” shall include one who is divorced but is required by the decree of divorce to contribute to the support of his former wife.

The term “injury” or “personal injury” means an injury by accident arising out of and in the course of employment, including any disease proximately caused by the employment, which is due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, process or employment, and to exclude all ordinary diseases of life to which the general public are exposed; including, also, any injury caused by the wilful act of a third person directed against the employees because of his or her employment, but shall not include injuries caused by the employee’s wilful intention to injure himself or herself or to injure another or caused by his or her wilful intoxication.

§ 43-3-39. Title of Act. This Act shall be cited as “The Workmen’s Compensation Act of Alaska.”

§ 43-3-40. **Separability of Provisions.** If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 43-3-41. **Laws Repealed.** This Act shall supersede and repeal all other laws of the Territory relat-

ing to Workmen's Compensation, and Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska 1933,^a as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 41, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937, are hereby specifically repealed."

^aFormerly Chapter 25, Session Laws of Alaska 1929.

Appendix B

UNITED STATES OF AMERICA,
TERRITORY OF ALASKA.—SS.

R. E. ROBERTSON, being first duly sworn on oath deposes and says I am attorney for the appellant; that in the absence of the record so showing I state:

(a) Landro's deposition was taken before one or more members of the Board on May 26, 1949.

(b) The hearing was held before the full Board on June 27, 1949.

(c) The Board made its decision and award on June 28, 1949, but the Board did not notify the appellant thereof until July 8, 1949.

(d) Appellant's complaint and appeal was filed with the Clerk of the District Court for the Third Judicial Division on July 28, 1949.

R. E. ROBERTSON.

Subscribed and sworn to before me this 15th day of August, 1950, in Juneau, Alaska.

(Seal)

F. O. EASTAUGH,

Notary Public for the Territory of Alaska.

My commission expires June 10, 1954.

No. 12561

IN THE
United States Court of Appeals
For the Ninth Circuit

LIBBY, MCNEILL & LIBBY,
a corporation,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD and
JOHN LANDRO,

Appellees,

Upon Appeal from the District Court for the
Territory of Alaska, First Division

BRIEF FOR APPELLEES

FILED

OCT - 2 1950

PAUL A. O'BRIEN

J. GERALD WILLIAMS and
JOHN DIMOND
for Alaska Industrial Board.

ROY E. JACKSON and
HENRY RODEN,
for Appellee John Landro

No. 12561

IN THE
United States Court of Appeals
For the Ninth Circuit

LIBBY, MCNEILL & LIBBY,
a corporation,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD and
JOHN LANDRO,

Appellees,

Upon Appeal from the District Court for the
Territory of Alaska, First Division

BRIEF FOR APPELLEES

J. GERALD WILLIAMS and
JOHN DIMOND
for Alaska Industrial Board.

ROY E. JACKSON and
HENRY RODEN,
for Appellee John Landro

Subject Index

	Page
Statement of Facts	1
Argument	2

Table of Authorities Cited

Cases

<i>Contractors vs. Pillsbury</i> , 150 Fed. (2) 312	8
<i>Devlin vs. Dept. of Labor</i> , 78 Pac. (2) 952	8
<i>Employers vs. Ind. A. C.</i> , 151 Pac. (2) 423	9
<i>Forno vs. Coyle</i> , 75 Fed. (2) 692	10
<i>Lallier Const. Co. vs. Ind. Com.</i> , 172 Pac. (2) 534	9
<i>McKinzie vs. Dept. of Labor</i> , 37 Pac. (2) 218 ...	8
<i>Tenant vs. Peoria Ry. Co.</i> , 321 U. S. 35	10

Alaska Cases

<i>Pilgrim vs. Grant</i> , 9 Alaska 417	10
---	----

Statutes

Section 43-3-13 Alaska Compiled Laws, 1949	6
Section 43-3-17 Alaska Compiled Laws, 1949 ...	9, 10
Section 55-11-51 Alaska Compiled Laws, 1949 ..	10

Rules of Alaska Industrial Board

Article 13,	6
Article 9 (c, d, e, h,)	6, 7

No. 12561

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY,
a corporation,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD and
JOHN LANDRO,

Appellees,

Upon Appeal from the District Court for the
Territory of Alaska, First Division

BRIEF FOR APPELLEES

STATEMENT OF FACTS.

Since appellant's brief does not include all the facts which appellees consider relevant, a brief statement follows:

The appellant employed the appellee Landro as a fisherman to supply its cannery at Eklunk, in Bristol Bay, Alaska, with salmon during the season of 1948. On the evening of July 5th, the weather was rough.

His fishing boat was temporarily tied to a scow. In order to save the boat from destruction he jumped from the scow to the boat. The boat gave a heave which threw him off balance and he landed on top of an anchor on his back, causing him great pain and making walking impossible. The next day he attempted to fish again. Due to his crippled condition he fell, striking his back again. He perved one fish, his partners had to do the rest of the work. Remained in the local hospital until July 19, when he went to Seattle to consult the Insurance Carrier's physician, Doctor Gray; the latter told him he had a pretty bad back; that there was no fracture but it appeared that "a vertebra was dislocated." Received treatment to October 14, when Doctor Gray advised he try some light work. In November Doctor Gray advised him to seek a warmer climate; he went to California; no relief; returned to Seattle in January 1949; attempted to find light work; unsuccessful; could not do it on account of sharp pains in lower back; his legs would buckle up and "I would collapse;" this happened three times stepping off sidewalk and 3-4 times in his house while trying to pick up tools. In February 1949 called on Doctor LeCocq for examination. Advised might require operation. Also called on Doctor Williams who also suggested possible operation. In March 1949 Doctor Gray advised him to get free treatment at the Sailors' Hospital in Seattle as Insurance Carrier would not furnish same. Went to sanatorium at St. Martin's hot springs. After three weeks there tried to find light work, which he was unable to do.

At time of hearing (May 26, 1949) his condition was "up and down; not good at all; it is such that I could not do any hard work; there are days that I might be able to do light work but other days I couldn't begin to do any work at all, due to the condition of my back; my legs pain me walking; after walking pain shoots down both legs; I am wearing a brace prescribed by Doctor Gray and adjusted by Doctor LeCocq; I have been wearing it ever since. I have been trying to walk without it but this gives me pain in the lower back and hips; before I went fishing I was first mate on a Liberty Ship; I am not able to do a mate's work since the injury; I haven't the strength to do it; it would be suicide for me to go fishing; I have tried to get light work as watchman or checker on the waterfront; never had to stop work on account of sickness; never had any trouble with my back before; I have done no work since the accident; two-thirds of the time I could not even do light work; Doctor LeCocq recommended treatment, not light work." Tr. pgs. 44-56.

The Industrial Board awarded Landro temporary disability compensation in conformity with the statute up to May 20, 1950.

On appeal the District Court affirmed the award. From this affirmance this appeal is prosecuted to this Honorable Court.

ARGUMENT

In its brief the appellant makes two points:

First: That the Industrial Board may not base its

Findings upon *ex parte*, or hearsay testimony; and

Second: That an attorney's fees cannot be assessed against the losing party on appeal from the Board's decision to the District Court.

We shall consider these points in the order presented.

FIRST—COMPETENT EVIDENCE

We agree that Findings of the Board must be supported by competent evidence and we respectfully suggest that such evidence is in the record of this case.

It is admitted that at the time of the accident the relation of employer-employee existed between appellant and Landro and that the accident arose out of and in the course of his employment.

It is also admitted that payment of temporary disability compensation was made to Landro up to October first, 1948. The Board allowed him temporary compensation up to May 20, 1949; hence the only fact to be established by competent evidence is that temporary disability continued up to May 20, 1949. What evidence is there to support this finding?

On May 26, 1950 the hearing was held before the Industrial Board. Landro, at that time testified with reference to his then condition:

“My condition is up and down; it is not good at all. There are days when I might be able to do light work but other days I couldn't begin to

do any work at all; this is due to the condition of my back; my legs pain me when walking and after walking pains shoot down both legs. The hips pain all the time; I am wearing the brace prescribed by Doctor Gray and Dr. LeCocqq; walking without the brace gives me pain; I don't know what kind of work I can do;" Tr. pgs. 50 *et seq.* Never had any trouble with my back before; have not done any work since the accident because two thirds of the time I couldn't even do light work." Tr. pg. 55. "Doctor LeCocq did not suggest that I do light work, he recommended treatment." Tr. pg. 56.

In addition to the foregoing testimony it is proper to call the Court's attention to the fact that the injured employee appeared before the Industrial Board in person. The Board had an opportunity to consider the appearance and demeanor of the claimant and of his seeming health and ability to work. The inspection of a witness is often an important factor in the weight to be given to his statements and such observation constitutes additional evidence upon which a Finding may be predicated and justifies a Finding as to the nature of any injury even though the Record may be bare as to that phase.

We take the liberty of suggesting here that the Alaska Industrial Board, which understands local conditions and on account of constant contact with fishermen in this Territory, must be credited with having knowledge as to what is required of them in the performance of their duties is able to judge by their appearance, conduct and demeanor what amount of labor if any, they may be able to perform.

Appellant's physician, Doctor Gray, testifies that at the time Landro interviewed him in March 1949 he would have had a "very difficult time holding down a job requiring manual labor." Tr. pg. 96.

We believe that the evidence submitted by the claimant himself is, as the District Judge concluded, amply sufficient to sustain the findings of the Industrial Board.

However in addition to this the claimant introduced in evidence the statement of Doctor Williams who, upon examination of the claimant on May 20, 1950, found that he was then able to perform light work, if any available, but not regular labor. Tr. pg. 36.

He also introduced the report of Doctor LeCocq who, on February 4, 1949 examined the claimant and then reported his conclusion as follows:

"This patient's condition at the present time is due to an increased dorsal rotundum with secondary accentuated compensatory lumbar lordosis. This is actually on a postural basis but has been *severely aggravated* by his fall incurred on July 5, 1948. Therefore it is felt that his condition is not fixed and that definite further treatment is in order at this time...If his course is not satisfactory by conservative measures, then the only alternative would be consideration of a localized spinal fusion." Tr. pg. 87.

The appellant claims these statements should not have been considered by the Board.

The Alaska Workmen's Compensation Act, section 43-3-13, Alaska Compiled Laws, 1949, reads:

“The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof.”

Pursuant to this authority, the Industrial Board, among others, adopted its Rule Number 13, which reads:

“The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence. Hearsay evidence shall be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient of itself to support a finding.”

Article 9(c), of the Rules adopted by the Industrial Board reads:

“The Board favors the production of medical evidence in the form of written reports. These reports should include:

1. History of the injury;
2. Source of all facts set forth in the history and complaints;
3. Findings on examination;
4. The patient's complaint;
5. Opinion as to the extent of disability and working ability;
6. Cause of the disability;
7. Medical treatment indicated;
8. Likelihood of permanent disability;
9. If permanent disability exists whether it is ready for rating;
10. The reasons for opinions.”

Article 9 of the Board Rules reads:

“Article 9(d). Upon the filing with the Board an application or other pleading, all parties must immediately, or in any event, within five days after service of such pleading, send to the Board the original signed reports of all physicians relating to the proceedings which they may have in their possession or under their control. Copies shall be served forthwith on the adverse party.

“Article 9(e). All physicians’ reports acquired by any of the parties during the pendency of the particular phase of the proceeding shall immediately, or in any event within five days of receipt, be sent to the Board and copies served on the adverse party.

“Article 9(h). If a party fails or refuses to comply with the foregoing provisions the Board may decline to receive in evidence any physician’s report or other written testimony from a physician whose report has not been so filed. It shall be presumed that the report of evidence withheld in violation of said sections was wilfully suppressed and would be adverse if produced.”

The statute just quoted deals with procedure only and not with any substantive rights and pursuant to it, the Board has authority to prescribe fair and reasonable rules and methods to be followed in proceedings pending before it. The reports of the two physicians were presented in accordance with these rules and the Board had the right to consider or reject them.

Under the common law of procedure substantive rights are governed by procedure; but this has been changed by the enactment of workmen’s compensation acts; under them substantive rights control procedure and common law principles are not applicable.

The reports by the doctors, required as aforesaid, become part of the Board’s file and con-

stitute a part of the record and may be considered by the Board though the sources of information on which they are based and the manner in which they become part of the file might affect their weight as evidence, they are nevertheless competent and admissible to be considered for what they are worth.

Devlin vs. Department of Labor 78 Pac. (2) 952.

“The manner in which they get into the record may affect their weight as evidence but, in our opinion, are not incompetent and may be considered by the Board for what they are worth.”

McKinzie vs. Department of Labor, 37 Pac. (2) 218.

We respectfully repeat, that the record supports the Findings of the Board as found by the District Court.

The situation here is fully covered by the opinion of this Honorable Court in:

Contractors vs. Pillsbury, 150 Fed. (2) at page 312 where the Court, speaking by Honorable Circuit Judge Bone says:

“There was evidence covering material facts before the Commissioner which would support the order of award. Logical deductions and inferences which may be and are drawn by him from the evidence should be taken as established facts and are not judicially reviewable. Even if the evidence permits conflicting inferences the inference drawn by the Commissioner is not subject to review and will not be re-weighed. The Commissioner is not bound to accept the opinion or

theory of any particular medical expert but he may rely upon his own observation and judgment in conjunction with all of the evidence before him."

We repeat that we do not contend that hearsay testimony alone is sufficient to support a material Finding of the Board; but the Board may consider it when it is sustained by other competent evidence.

Appellant, in its Brief, cites a number of authorities holding that hearsay evidence alone is not sufficient to establish the essential facts of an accidental injury, such as:

Lallier Construction Co. vs. Industrial Commission, 172 Pac. (2) 534, and others among them:

Employers etc. vs. Industrial A. C., 151 Pac. 423.

It will be noted that the holding in all these cases is that "hearsay evidence alone" is not sufficient, plainly indicating that, to a degree, it is admissible under the Workmen's Compensation Acts and will be given such weight as the hearing authority may deem it entitled to.

Point Two

Recovery of Attorney's Fee on Appeal.

The applicable provisions of the Alaska Workmen's Compensation Act read:

Section 43-3-17 ACL 1949:

“In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.”

Costs in ordinary civil suits are governed by Section 55-11-51:

“The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney’s fees in maintaining the action or defense thereto, which allowances are termed costs.”

The court in Alaska has consistently allowed attorney fees as costs to the prevailing party, generally.

Pilgrim vs. Grant, 9 Alaska Reports 417.

And this Court has allowed attorney fees as costs.

Forno vs. Coyle, 75 Fed. (2) 692.

The District Court for the First Division of Alaska, has uniformly allowed attorney’s fees as costs in appeals coming before it from the Industrial Board, viz:

J. H. Scott, vs. Alaska Industrial Board and Edward Erickson, decided June 10, 1950.

In conclusion we desire to repeat, what the Supreme Court of the United States, has stated in:

Tenant vs. Peoria Ry. Co., 321, 29, at pg. 35.

“It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury, on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal

points of judicial review is the reasonableness of the particular inferences or conclusions drawn by the jury. It is the jury, not the court, which is the fact finding body.”

In the case at bar the Industrial Board was the fact finding body; its findings were supported by the finding of the District Court. We respectfully urge that the judgment of the District Court be sustained.

Respectfully submitted,

J. G. WILLIAMS and JOHN DIMOND
for Appellee Alaska Industrial Board
and R. E. JACKSON and HENRY RODEN
for Appellee Landro.

No. 12,561

IN THE

United States Court of Appeals
For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of
the Territorial Insurance Commis-
sioner, Attorney General of Alaska and
the Territorial Commissioner of Labor,
and JOHN LANDRO,
Appellees.

APPELLANT'S REPLY BRIEF.

R. E. ROBERTSON,
Seward Building, Juneau, Alaska,
ROBERT W. HOLLAND,
BOGLE, BOGLE & GATES,
Central Building, Seattle 4, Washington,
Attorneys for Appellant.

FILED

OCT 10 1950

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
Argument	1
Competent evidence	1
Recovery of attorneys' fees on appeal.....	5
Conclusion	6

Table of Authorities Cited

Cases	Page
Brown v. Department of Labor, 161 P. (2d) 533	3
Contractors et al. v. Pillsbury, 150 F. (2d) 310	4
Devlin v. Department of Labor, 78 P. (2d) 952	3
Employers etc. v. Industrial A. C., 151 Pac. 423	5
Hutchings v. Department of Labor, 167 P. (2d) 444	3
Karlson v. Department of Labor, 173 P. (2d) 1001	4
Lallier Construction Co. v. Industrial Commissioner, 17 P. (2d) 534	5
Lindsey v. Department of Labor, 213 P. (2d) 316	4
McKinnie v. Department of Labor, 37 P. (2d) 218	3
Norton v. Warner Co., 321 U. S. 565, 88 L. Ed. 931	4
Olympia Brewing Co. v. Department of Labor, 208 P. (2d) 1181	4
South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 84 L. Ed. 732	4
Sweitzer v. Department of Labor, 34 P. (2d) 350	3

Statutes

A.C.L.A. 1941, Section 43-3-14	2
A.C.L.A. 1949, Section 55-11-52	5
A.C.L.A. 1949, Section 55-11-55	5

No. 12,561

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LIBBY, McNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of
the Territorial Insurance Commis-
sioner, Attorney General of Alaska and
the Territorial Commissioner of Labor,
and JOHN LANDRO,
Appellees.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

COMPETENT EVIDENCE.

Appellant in its main brief (pp. 12 to 37) so thoroughly discussed the incompetency of the evidence upon which Landro relies (Appellees' Brief, pp. 2-5) as being competent evidence to support his claim, that appellant believes no necessity exists of again reiterating its argument on this point.

Appellant, however, does draw attention to appellees' own admission that the Board's findings must

be supported by competent evidence (Appellees' Brief, p. 4); but, nonetheless seemingly argues (Appellees' Brief, p. 5) that this evidence may consist of nothing more than Landro's appearance and demeanor upon the witness stand, when giving his evidence before the Board.

Appellant concedes that any forum may take into consideration the appearance and demeanor of a witness appearing before it in determining the weight and credibility to be given to that witness' testimony; but, appellant submits that, as so admitted by the appellees as hereinbefore stated, the findings of the Board must be based upon competent evidence, and the Board has no authority to make any finding except upon competent evidence regardless of what personal knowledge the Board may have of local conditions in Alaska.

Appellant contends that the reports and letters of Drs. Williams and LeCocq were not admissible in evidence for any purpose whatsoever (Appellant's Main Brief, pp. 15 to 25), and that the provision of the Act that "the Industrial Board may make rules not inconsistent with this act for carrying out the provisions hereof", Section 43-3-14 A.C.L.A. 1941 (Appendix "A", p. 29; Appellant's Main Brief, pp. 27-37) does not authorize the Board by rule or otherwise to base a finding upon other than competent evidence.

Appellant submits that the law nowhere authorizes the admission of incompetent evidence at a hearing upon a contested claim before the Board or the basing of a finding upon hearsay or *ex parte* evidence.

The Washington Supreme Court has specifically overruled its two decisions (Appellees' Brief, p. 9) in *Devlin v. Department of Labor*, 78 P. (2d) 952, and *McKinnie v. Department of Labor*, 37 P. (2d) 218, in its subsequent decision in—

Hutchings v. Department of Labor, 167 P. (2d) 444, 449, 450,

and by a long line of cases has sustained the principle for which appellant contends in this case, namely: that even in a workman's compensation case a finding of the Board must be based upon competent evidence.

In *Sweitzer v. Department of Labor*, 34 P. (2d) 350, that Court, upon rehearing, reversed its previous decision in 30 P. (2d) 980 and held that the report of a doctor who was not sworn as a witness was erroneously admitted in evidence; hence, that the decision of the Joint Board and the finding of the Superior Court were not entitled to a presumption of correctness.

That principle was sustained by that Court in—
Brown v. Department of Labor, 161 P. (2d) 533, 534.

That doctrine was again reaffirmed in *Hutchings v. Department of Labor*, supra, wherein as stated, not only were the previous *McKinnie* and *Devlin* cases overruled, but the Court also held that no part of the *ex parte* record, simply because the statute required it to be certified up to the Court, was admissible except subject to rules of evidence applicable to civil cases, and that a letter written by the alleged injured

employee to a physician was neither competent nor relevant.

The Washington Supreme Court has reaffirmed this rule in such late cases as—

Karlson v. Department of Labor, 173 P. (2d) 1001, 1012;

Olympia Brewing Co. v. Department of Labor, 208 P. (2d) 1181, 1185;

Lindsey v. Department of Labor, 213 P. (2d) 316, 317.

Appellant is not unmindful of the rule laid down by this Court in *Contractors et al. v. Pillsbury*, 150 F. (2d) 310, 312 (Appellees' Brief, p. 9); but, appellant submits that this Court neither in that nor any case has ever held other than that a finding must be based upon competent evidence.

Nor did the United States Supreme Court hold to the contrary in its two decisions cited by Mr. Circuit Judge Bone in the *Contractors* case. Mr. Justice Hughes specifically said: "We think there was evidence to support the finding of the Deputy Commissioner" in—

South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 261, 84 L. Ed. 732, 737, 738.

It is also clear that the United States Supreme Court holds that the inference leading to any finding must be based upon evidence.

See:

Norton v. Warner Co., 321 U.S. 565, 568, 88 L. Ed. 931, 935.

Appellant challenges appellees' contention (Appellees' Brief, p. 10) that hearsay or any other incompetent evidence is admissible for the purpose of being given such weight as the forum by whom a contested claim is heard may deem it entitled to, or that any such principle is supported by either

Lallier Construction Co. v. Industrial Commissioner, 17 P. (2d) 534,

or

Employers etc. v. Industrial A. C., 151 Pac. 423, or by any other decision cited by appellant (Appellant's Main Brief, pp. 30 to 37) except in such cases and for such specific purposes as some state statutes authorize, which is not true of the Alaska statute (Appendix "A", pp. 1-52, Appellant's Main Brief).

RECOVERY OF ATTORNEYS' FEES ON APPEAL.

Appellant has discussed this question in its main brief (pp. 39 to 44) and believes no necessity exists to reiterate its argument other than to point out that the appellees (Appellees' Brief, pp. 10-11) clearly fail to give any heed to the fact that attorneys' fees allowable as costs under Section 55-11-55, A.C.L.A. 1949, are specifically limited to the classes of cases set out in Section 55-11-52, A.C.L.A. 1949 (Appellant's Main Brief, p. 43), whereas Workmen's compensation claims are not within any of those classes.

CONCLUSION.

Appellant again urges that the judgment of the District Court and the decision and award of the Alaska Industrial Board should be reversed and modified to holding that appellee Landro's total temporary disability ended on October 1, 1948, for which he was entitled to be paid total temporary compensation of \$680.76 only, which was paid to him prior to his making and filing his claim herein (R. 39); and, that the decision of the District Court should be reversed in allowing appellee Landro an attorney fee of \$200.00, or any sum, as an allowable cost for the services of his attorney in the proceedings on the appeal before the District Court.

Dated, October 9, 1950.

Respectfully submitted,

R. E. ROBERTSON,

ROBERT W. HOLLAND,

BOGLE, BOGLE & GATES,

Attorneys for Appellant.

No. 12,561

United States Court of Appeals
For the Ninth Circuit

LIBBY, McNEILL & LIBBY (a corporation),

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed
of the Territorial Insurance Commissioner,
Attorney General of Alaska and the Territorial
Commissioner of Labor, and JOHN LANDRO,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

R. E. ROBERTSON,

Seward Building, Juneau, Alaska,

ROBERT V. HOLLAND,

BOGLE, BOGLE & GATES,

Central Building, Seattle 4, Washington,

Attorneys for Appellant.

Subject Index

	Point I.	Page
Under the Workmen's Compensation Act of Alaska the Alaska Industrial Board's findings, decision and award must be based upon competent evidence, and not upon ex parte, hearsay, unverified, or other incompetent evidence, whereas the Board's decision and award and its findings herein were based upon ex parte, hearsay, unverified, or other incompetent evidence and therefore were not conclusive upon the District Court.....		2
	Point II.	
The District Court was without jurisdiction to allow and assess an attorney's fee of \$200.00, or any sum, to Landro for services of his attorney in the proceedings before that court		6

Table of Authorities Cited

Cases	Pages
Bridges v. Wixon, 326 US 135, 89 L.ed. 2103.....	4
Interstate Commerce Com. v. Louisville & N.R. Co., 227 US 88, 57 L.ed. 431	2, 3, 4

Statutes

Alaska Compiled Laws 1949, Section 43-3-17	6
Alaska Compiled Laws Annotated 1949, Section 55-11-52...	6
Alaska Compiled Laws Annotated 1949, Section 55-11-55...	6
Alaska Session Laws 1946, Chapter 9	6
Alaska Session Laws 1937, Chapter 58	6
Alaska Session Laws 1947, Chapter 84	6

Texts

1 Wigmore, p. 83, 3rd ed.	5
--------------------------------	---

No. 12,561

United States Court of Appeals For the Ninth Circuit

LIBBY, McNEILL & LIBBY (a corporation),

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed
of the Territorial Insurance Commissioner,
Attorney General of Alaska and the Territorial
Commissioner of Labor, and JOHN LANDRO,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellant asks for a rehearing because it believes the Court in its opinion of August 10, 1951, notwithstanding its serious consideration for nearly 8 months of the points upon which appellant urges it is entitled to a reversal, overlooked competent, relevant evidence and either overlooked or disregarded applicable principles of law sustaining appellant's appeal.

POINT I.

UNDER THE WORKMEN'S COMPENSATION ACT OF ALASKA THE ALASKA INDUSTRIAL BOARD'S FINDINGS, DECISION AND AWARD MUST BE BASED UPON COMPETENT EVIDENCE, AND NOT UPON EX PARTE, HEARSAY, UNVERIFIED, OR OTHER INCOMPETENT EVIDENCE, WHEREAS THE BOARD'S DECISION AND AWARD AND ITS FINDINGS HEREIN WERE BASED UPON EX PARTE, HEARSAY, UNVERIFIED, OR OTHER INCOMPETENT EVIDENCE AND THEREFORE WERE NOT CONCLUSIVE UPON THE DISTRICT COURT.

Doctors LeCocq and Williams' letters were both unverified and hearsay. (Appellant's main brief, 18-20). Appellant at all times objected to their admissibility; in fact, in its Admission of Service and Answer to Application put Landro on notice of its objections to all *ex parte* evidence (R. 41, par. 9).

To admit them to supplement other evidence violates the rule announced by the U. S. Supreme Court in *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, *infra*, just as much as though admitted to contradict other evidence. To argue they may be used to supplement other evidence, in appellant's judgment, simply begs the question of their incompetency and inadmissibility.

Appellant doubts if it had offered an unverified letter by Doctor Gray or any other physician stating Landro had recovered from his injury on October 1, 1948, or that Landro's testimony was false, that it would have been admitted in evidence. Appellant is convinced it wouldn't have been admissible.

Landro's statements (R. 48, 59) of what LeCocq and Williams told him are not only the veriest hearsay but also self-serving.

Furthermore, under the well known rules appellant cited in its brief (p. 19-23), Landro was not qualified to testify to what caused his condition.

To premise the Board's award of compensation to injured fishermen or any other kind of employee upon the Board's ability "to judge by their appearance, conduct and demeanor what amount of labor, if any, they may be able to perform" (Op. 3) is to base it upon the Board's personal knowledge, which may be founded upon surmise, conjecture, hearsay, or anything else, and, appellant submits is clearly within the rule laid down by the U. S. Supreme Court: "In such cases Commissioners cannot act upon their own information, as could jurors in primitive days." *Interstate Commerce Com. v. Louisville & N. R. Co.*, *infra*.

Appellant would have no means, except by mental telepathy, to be apprised of the evidence submitted or to be considered, nor could it cross-examine the members of the Board as to their source of information.

The governing rule was announced by the United States Supreme Court, viz.:

But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation

or rebuttal. In no other way can a party maintain its rights or make its defense.

Interstate Commerce Com. v. Louisville & N.R. Co., 227 US 88, 93, 57 L.ed. 431, 434, which rule was reaffirmed in

Bridges v. Wixon, 326 US 135, 89 L.ed. 2103.

This rule applies in Alaska, whose legislature has no authority to deprive appellant of due process of law or of the equal protection of the laws, which deprivation necessarily results by violation of the rule.

The Board has no authority to violate this rule announced by the U. S. Supreme Court, and the Board's Rule 13, in admitting hearsay or other incompetent evidence, necessarily is illegal.

Alaska's legislature is a legislative, not an administrative, body; hence, necessarily the Federal Administrative Procedure Act doesn't apply to it; but, such fact is entirely immaterial, because the legislature's acts are subject to the Constitution of the United States.

Rules, such as the Board's Rule 13, and the administration of them as the Board did in its award in this and the companion *Lathourakis* case, undoubtedly lead to the enactment of the Administrative Procedure Act in Congress' attempt to prevent Federal administrative bodies, similar to the Alaska Industrial Board, from depriving persons of their constitutional rights.

Appellant is cognizant of the theoretical rule advocated by Wigmore. But, fortunately, even as admitted

by Wigmore (Volume 1, p. 83, 3rd ed.), the majority of the courts refuse to recognize a theory that, if practiced, would deprive litigants of the American principles of justice by which their constitutional rights are protected against the threat of hearsay, with its lack of cross-examination to establish the truth and to destroy rumor, gossip, and falsehood.

It is of grave moment if the Court lays down or even intimates that in its circuit a litigant cannot claim and rely upon the right of cross-examination; but, seemingly if this Court in either this or the companion *Lathourakis* case, upholds its present opinion, at least by implication it thereby announces that that right does not exist in hearings before the Alaska Industrial Board.

Appellant predicts that such announcement would eventually lead to rumors, newspaper articles, and unsworn hearsay of all kinds becoming admissible even in the courts.

Dr. Gray said specifically that on September 30, 1948, he was of the opinion Landro's "temporary disability could be terminated on October 1, 1948," (R. 21-22) and that in March, 1949, he told Landro, "I felt his condition was not related to the injury." (R. 24, also 26).

Appellant submits there is no other competent evidence either of the termination of Landro's temporary disability or of Landro's condition in March, 1949.

Nor is there any competent contradiction of Gray's opinion on October 29, 1948, that: "I felt that the

subjective symptoms represented a disability of about 10 per cent, and I recommended that if his claim was in order, it could be closed on such an award.” (R. 18, 19).

Appellant urges that Landro has been paid in full all of the temporary disability compensation to which he is entitled, and that there is no competent evidence that his temporary disability ended on any date other than on October 1, 1948.

POINT II.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ALLOW AND ASSESS AN ATTORNEY’S FEE OF \$200.00, OR ANY SUM, TO LANDRO FOR SERVICES OF HIS ATTORNEY IN THE PROCEEDINGS BEFORE THAT COURT.

Appellant submits that this Court’s opinion disregards the fact that when Section 43-3-17, ACL 1949, reading:

“In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.”

was enacted on April 1, 1946 (Ch. 9, ASL 1946,—Appendix A, Appellant’s Brief), attorney’s fees were not allowed as costs in ordinary civil actions under Chapter 58, ASL 1937, which was then in effect.

Chapter 84, ASL 1947, now Section 55-11-55, ACLA 1949, was not enacted until March 27, 1947.

But, the allowance of costs under Section 55-11-55 is controlled by Section 55-11-52, ACLA 1949, and this

proceedings is not within the purview of the latter section.

Appellant submits that it is unthinkable the Territorial Legislature, without plain words, would enact a law requiring an injured employee to pay his employer's attorney fee should an appeal from the Board's award to the District Court result favorably to the employer, yet surely, if an unsuccessful employer may be forced to pay it, so in justice and fair play should the employee, if he loses in the District Court.

WHEREFORE appellant prays that it may be granted a rehearing, but should it be denied that a further stay of 30 days may be granted.

Dated, Juneau, Alaska,
September 7, 1951.

Respectfully,
R. E. ROBERTSON,
ROBERT V. HOLLAND,
BOGLE, BOGLE & GATES,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay; and that both points are meritorious, and the first is of grave import to the welfare of Alaska and to the administration of justice therein.

Dated, Juneau, Alaska,
September 7, 1951.

R. E. ROBERTSON,
Of Attorneys for Appellant.

